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THE MEMORA

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TRESPASSERS ON RAILROAD TRACK — NORTH CAROLINA RULE.

The distressingly large number of persons injured or killed each year while trespassing on the track of railroads renders the subject one of much interest to the humanitarian, and of even greater interest to those engaged in the management and operation of railroads and who have a direct pecuniary interest in the result of these injuries by reason of the unjust verdicts of juries, holding the railroad companies liable in damages in cases where no amount of care and caution could have avoided the accident and consequent injury of the trespasser.

Under the rules of law laid down by the Supreme Court of North Carolina under the doctrine of "the last clear chance" it is the duty of an engineer in charge of a train in motion on the track to keep a diligent outlook for trespassers upon the track and if he discovers or by the exercise of ordinary care can discover a trespasser lying helpless upon the track in front of such train in time, by the exercise of the appliances at his command, to stop the train and avoid collision with the trespasser, it is his duty to do so. Pickett v. Wilmington & W. R. Co. 117 N. C. 616, 23 S. E. 264.

The same rule applies to trespassers on a bridge or trestle too high for them to step to safety, and this though the trespasser is in the full possession of all his faculties and is at no disadvantage and is not helpless upon the track. Clark v. Wilmington & W. R. Co., 109 N. C. 430, 14 S. E. 43.

The same rule applies to infants and small children upon the track who, by reason of their immaturity, are incapable of contributory negligence. Bottoms v. Seaboard, etc., R. Co., 114 N. C. 699, 19 S. E. 730.

Common carriers by rail are also liable for all injuries to trespassers upon their tracks whether helpless or not if such injuries occur at night and are due to the failure of the company to equip its engine with a proper headlight. Stanley v. Durham, etc., R. Co., 120 N. C. 514, 27 S. E. 27.

The rule is quite different, however, as to liability for injuries to pedestrians and others standing on or walking along the track, or sitting on the ends of cross ties, for they are at no disadvantage and are apparently in full possession of their faculties and capable of taking care of themselves. As to this class of trespassers, the engineer has the right to assume that they are in full possession of all their faculties both of body and of mind, that they have notice of the approach of the train and that they will clear the track in time to avoid injury and therefore it is not the duty of the engineer in charge of a moving train, either to stop or to slacken speed.

As to this class of trespassers the court says:

> "Every man in the possession of his natural faculties must know and the law will not hear him say he does not know that a railroad track is a place of constant and almost imminent danger. If he chooses to use it as a footway when he is not expressly or impliedly invited to do so he must understand that he does so at his peril and that he will at all times be menaced by trains moving to and fro upon the track."

Beach v. Southern R. Co. 148 N. C. 153, 61 S. E. 664.

The same principle applies to trespassers and to licensees. Abernathy v. Southern R. Co., 164 N. C. 91, 80 S. E. 421.

And the same rule applies to injuries to trespassers on side tracks and passing tracks as to injuries on the main line. High v. Carolina, etc., R. Co., 112 N. C. 385, 17 S. E. 79; Meredith v. Richmond & D. R. Co., 108 N. C. 616, 13 S. E. 137; Abernathy v. Southern R. Co., 164 N. C. 91, 80 S. E. 421.

The fact that by reason of noise the trespasser cannot hear the approaching train which comes in collision with him does not change the rule, for under such circumstances it is more imperatively required that he shall use his sense of sight, if he can see the approaching train, while the engineer has the right to assume that he has looked and has seen the approaching train and that he will clear the track in time to avoid injury. In answering the contention that noise on a nearby track caused by a passing train put the intestate at a disadvantage so that he could not hear the approaching train which came in collision with and injured and killed him, and that therefore he should be exculpated from contributory negligence, the court said:

> "But it was the duty of the intestate to look as well as to listen under the circumstances and he was negligent if he failed to use his eyes as well as his ears. On the

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"The intestate, notwithstanding the engine was exhausting steam on a track close by him, even if that deafened him so that he could not hear the train as it approached, had the sense of sight left which was just as available to him in averting injury to himself if he had exercised the least degree of care as the sense of hearing would have been if there had been no noise. His own negligence caused his death and not that of the engineer. The use of his sense of sight would have saved him and the engineer had the right to presume, even up to the last moment, when his efforts to stop his train proved unavailing, that he had made use of it and would clear the track before the train reached him."

Beach v. Southern R. Co., 148 N. C. 153, 61 S. E. 664.

"A railroad company is not under any legal obligations to regulate the speed of its trains for the convenience of those using its right of way, for its tracks are always places of danger and the pedestrian, who can easily step aside and avoid any danger, should do so on the approach of a train. He cannot require the company to slow up any more than to stop. He must look out for trains and take care of himself and the engineer has the right to suppose that he has done so or that he will do so in time to save himself. He must expect trains at all times for he does not control the schedules of the company and besides it has the right to run extra trains and to use its tracks for its purpose at any hour it chooses in the transaction of its business as a public carrier and cannot be lawfully obstructed or impeded in the prosecution of this right."

Davis v Southern R. Co., 170 N. C. 582, 87 S. . 745.

In a case where the intestate was killed at night by a passing train while sitting on the end of a cross tie the court said:

"When he placed himself in a position where he was liable to be stricken by a passing engine it was his duty to keep a sharp lookout and if he carelessly, recklessly or in a drunken stupor remained on the track when the engine was aproaching and until it came in contact with him, he was negligent. * * * If it were conceded that the engineer saw the deceased walking along the track or sitting upright on the end of a cross tie in time to have stopped the train without peril or difficulty he was justified in believing, up to the last moment, in the absence of knowledge or information, that he was insane or deaf, that intestate would take reasonable precaution for his own safety by moving out of the way."

Norwood v. Raleigh & G. R. Co., 111 N. C. 236, 16 S. E. 4.

According to the principle repeatedly declared in all of these cases the question of liability is not to be solved by any reference to what the engineer may have done or omitted to do but by the conduct of the injured trespasser and if the latter would not see, when he could see, and would not hear, when he could hear, and remained on the track in reckless disregard of his own safety in sight or hearing of an approaching train, the law adjudges any injuries he may receive the result of his own carelessness. Parker v. Wilmington & W. R. Co., 86 N. C. 221; McAdoo v. Richmond & D. R. Co., 105 N. C. 140, 11 S. E. 316; Daily v. Richmond & D. R. Co., 106 N. C. 301, 11 S. E. 320; Ellerbe v. Carolina, etc., R. Co., 118 N. C. 1024, 24 S. E. 808; Neal v. Carolina, etc., R. Co., 126 N. C. 635, 36 S. E. 117; Lea v. Durham, etc., R. Co., 129 N. C. 459, 40 S. E. 212; Bessent v. Southern R. Co., 132 N. C. 934, 44 S. E. 648; Pharr v. Southern R. Co., 133 N. C. 610, 45 S. E. 1021; Crenshaw v. Asheville, etc., St. R. Co., 144 N. C. 314, 56 S. E. 945; Beach v. Southern R. Co., 148 N. C. 153, 61 S. E. 664; Abernathy v. Southern R. Co., 164 N. C. 91, 80 S. E. 421.

And it has also been held that the duty imposed upon common carriers by rail of giving notice of the approach of their trains to intersecting highway crossings for the benefit of travelers upon such highways is not for the benefit of trespassers on or along the track and away from such crossings and that they cannot be heard to complain of a failure to give such notice. McAdoo v. Richmond & D. R. Co., 105 N. C. 140, 11 S. E. 316; Morrow v. Southern R. Co., 147 N. C. 623, 61 S. E. 621.

S. J. ERVIN.

Morganton, N. C., December 21, 1916.

Carrier of Livestock—Notice of Claim—Waiver.—Stipulation in contract for interstate shipment of livestock that verified claim for damage must be made in writing within 10 days after removal of stock from the cars, made in consideration of a reduced rate, is valid; and is not complied with, or waived, by oral notice to the traveling freight agent who agreed to look into to claim. Ill. Cent. R. Co. v. Davis (Miss.), 72 So. 874.

Federal Employers' Liability Act—Hostler Engaged in Interstate Commerce.—A hostler in the employ of a railway company engaged in interstate commerce, whose duty was to fit out engines for use in such commerce, and who had, a short time before he was injured, been engaged in such work, is employed in interstate commerce and is entitled to sue under the Federal Employers' Liability Act, although at the time of his injury he was on his way home from his work, the injury occurring in the yard. Hinson v. Atlanta & C. Air Line Ry. Co., (N. C.) 90 S. E. 772.

EFFECT OF FEDERAL ACT OF MARCH 4, 1915, AMENDING BOILER INSPECTION LAW, UPON STATE LAWS PRESCRIBING OR REGULATING LOCOMOTIVE HEADLIGHTS.

The federal act of March 4, 1915, provides that section 2 of the Boiler Inspection Act shall "apply to and include the entire locomotive and tender and all parts and appurtenances thereof;" that the federal boiler inspection officials shall have the same powers and duties as to all the parts and appurtenances of the engine and tender as they now have as to the boiler and its appurtenances; and that the Boiler Inspection Law shall apply to the entire locomotive and tender and all of their parts.

Section 2 of the Boiler Inspection Law makes it unlawful for carriers to use in interstate commerce any locomotive "unless the boiler of said locomotive and appurtenances thereof are in proper condition and safe to operate in the service to which the same is put, that the same may be employed in the active service of such carrier in moving traffic without unnecessary peril to life or limb," and provides for inspection of same.

The act provides for the appointment by the Interstate Commerce Commission of federal inspectors and for the promulgation of rules and instructions "not inconsistent with" the act, which rules must be approved by the Commission before becoming effective.

Section 6 of the Act prescribes the duties of the inspectors and provides that when any inspector finds any boiler or its appurtenances "not conforming to the requirements of the law or the rules and regulations," established under the act he shall notify the carrier that the locomotive is not in serviceable condition; and in such case that the boiler shall not be used until put into serviceable condition; provided, that the carrier, when notified by the inspector that a boiler is not in serviceable condition because of defects pointed out by the inspector, may appeal to the chief inspector, who shall have the boiler re-inspected and authorize the carrier to put it into service if it be found to be in serviceable condition.

When we apply these provisions of the Boiler Inspection Law to the entire engine and appurtenances under the amendment, it is plain that safety is the keynote and that the federal officials charged with the execution of the law may condemn any part or appliance of an engine or tender which is considered to be likely to cause injury to anyone—employee, passenger, or outsider—whether the unsafe condition be in the design, construction, material or otherwise of the engine or any part or appliance thereof.

For example, if an engine should be equipped with an oil headlight of small power, there can be no doubt that the use of the engine could be forbidden on that account and, for the same reason, if the federal officials should conclude that electric headlights are dangerous, it can hardly be doubted that their use could be prohibited under the authority of the federal act.

Congress has, then, conferred on the Commission and its Boiler Inspection Division power over the entire matter of the engine and tender and the appurtenances thereof, so far as considerations of safety are involved. If the federal authorities should refuse to pass an engine equipped with electric headlights, it seems clear that the carrier could take off the electric headlight, substitute acetylene or some other form of light acceptable to the federal officials and operate the engine regardless of state laws requiring electric headlights, for, under such circumstances, the carrier would not be able to operate its engine in conformity to both the state and the federal regulations, and the latter would, of course, prevail.

Supposing, however, that the federal officials should not, by rule or otherwise, take action with respect to electric headlights, would state laws requiring same be superseded?

Let us take note of the authorities.

Contrast the decision of the United States Supreme Court in the Georgia Headlight Case with its decision in the Indiana Safety Appliance case.

In the former case (Atlantic Coast Line R. Co. v. Georgia, 234 U. S. 280), the Georgia statute requiring electric headlights on locomotives was atacked upon the ground (inter alia) that the state law violated the commerce clause in that Congress had excluded state legislation by the exercise of its power over the subject matter. Attention was called by the railroad counsel to the Safety Appliance Acts and the orders of the Interstate Commerce Commission thereunder, to the federal Ash Pan Act, to the act requiring the Commission to investigate accidents, and to the Boiler Inspection Act. But the court said (pp. 293-4):

> "But it is manifest that none of these acts provides regulations for locomotive headlights. Attention is also called to the investigations conducted by what is known as the 'block-signal and train control board' (organized by the Commission) and the reports of that board with respect to sundry devices and appliances, including headlights. It does not appear, however, either that Congress has acted or that the Commission under the authority of Congress has established any regulation so far as headlights are involved. As to these, the situation has not been altered by any exertion of federal power and the case stands as it has always stood without regulation unless it be supplied by local authority. The most that can be said is that inquiries have been made, but that Congress has not yet decided to establish regulations, either directly or through its subordinate body, as to the appliance in question. The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken. Missouri Pacific v. Larabee Mills, supra; Savage v. Jones, 225 U. S. 501, 533."

In the Indiana case (Southern Ry. Co. v. Railroad Commission of Indiana, 236 U. S. 439) the

railroad company had been convicted of a violation of the state law which required railway companies to place secure grab-irons and handholds on the ends or sides of cars. The Supreme Court held that the state statute was inoperative, inasmuch as Congress had

> "so far occupied the field of legislation relating to the equipment of freight cars with safety appliances as to supersede existing and prevent further legislation on that subject." (P. 447.)

The court thus distinguishes the Georgia Headlight case (p. 446):

> "Congress of course could have 'circumscribed its regulations' so as to occupy a limited field. Savage v. Jones, 225 U. S. 501, 533. Atlantic Coast Line v. Georgia, 234 U. S. 280, 293. But so far as it did legislate, the exclusive effect of the Safety Appliance Act did not relate merely to details of the statute and the penalties it imposed, but extended to the whole subject of equipping cars with appliances intended for the protection of employes. The States thereafter could not legislate so as to require greater or less or different equipment; nor could they punish by imposing greater or less or different penalties."

In conclusion, the court declared the following test as controlling the decision (p. 448):

> "The test, however, is not whether the state legislation is in conflict with the details of the federal or supplements it, but whether the State had any jurisdiction of a subject over which Congress had exerted its exclusive control."

The federal Safety Appliance Act of 1893 (sec. 4) makes it unlawful for railroad companies "to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars. The federal act of 1911 provides (sec. 2) that:

> "All cars must be equipped with secure sill steps and efficient hand brakes; all cars requiring secure ladders and secure running boards shall be equipped with such ladders and running boards, and all cars having ladders shall also be equipped with secure hand-holds or grab-irons at the tops of such ladders."

Section 3 of the act (of 1911) requires the Interstate Commerce Commission to prescribe the "numbers, dimensions, location, and manner of application" of the appliances provided for in section 2 of the act and section 4 of the act of 1893.

Thus, in considering the Indiana case, it will be observed that Congress itself prescribes just what appliances shall be placed on cars for the safety of employees in making their way along and over same, and it may also be said that the Interstate Commerce Commission had, under the authority of the law, prescribed in detail just what appliances of the sort required by the act must be affixed to the cars. There is no question, then, that as to these matters the federal government "had exerted its exclusive control."

We have here a case that falls between the Georgia Headlight case and the Indiana Safety Appliance case.

Congress has conferred power upon its officials to regulate the subject of all locomotive appliances in the aspect of safety but has not itself prescribed in detail what appliances should be deemed safe or unsafe. Logically, as it seems to us, the conclusion can hardly be escaped that, inasmuch as Congress has taken charge of the matter of the appliances of locomotives in the aspect of safety of operation, the State is excluded from that field. The trouble is that the Supreme Court has not, in our view, consistently adhered to the logic upon which the decision in the Indiana case is founded. We refer to the doctrine of the Larabee Mills case, 211 U. S. 612. In that case, the Mills applied for a mandamus to compel the carrier (Mo. Pac. Ry Co.) to interchange cars to and from its mills with the Santa Fe. This service would in part be in interstate commerce. Nevertheless, the United States Supreme Court affirmed the judgment of the Kansas Court, awarding the writ, taking the view that the Act to Regulate Commerce did not prevent the State from enforcing this "common-law duty" of the carrier because the Interstate Commerce Commission had not exerted its power in the premises. We quote from the opinion (p. 623):

> "On the other hand, it is said that Congress has already acted, has created the Interstate Commerce Commission, and given to it a large measure of control over interstate commerce. But the fact that Congress has entrusted power to that Commission does not, in the absence of action by it, change the rule which existed prior to the creation of the Commission. Congress could always regulate interstate commerce, and could make specific provisions in reference thereto, and yet this has not been held to interfere with the power of the State in these incidental matters. A mere delegation by Congress to the Commission of a like power has no greater effect, and does not of itself disturb the authority of the State. It is not contended that the Commission has taken any action in respect to the particular matters involved. It may never do so, and no one can in advance anticipate what it will do when it acts. Until then the authority of the State in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself and in the absence of action by the commission interfere with the authority of the State to make those regulations conducive to the welfare and convenience of its citizens. Running through the entire argument of counsel for the Missouri Pacific is the thought that the

> control of Congress over interstate commerce and the delegation of that control to a commission necessarily withdraws from the State all power in respect to regulations of a local character. This proposition cannot be sustained. Until specific action by Congress or the commisison the control of the State over these incidental matters remains undisturbed."

Mr. Chief Justice White and Mr. Justice Moody dissented.

It will be recalled that this Larabee Mills case is cited at the end of the opinion in the Headlight case following this sentence:

> "The intent to supersede the exercise of the State's police power with respect to this subject cannot be inferred from the restricted action which thus far has been taken."

In the Larabee case the Act to Regulate Commerce conferred upon the Interstate Commerce Commission power over the subject matter. Nevertheless, the State was permitted to act. When we apply the doctrine to the instant matter, it becomes evident that the doctrine of the Indiana case cannot, as applied to the instant matter, be confidently relied on.

When the Larabee opinion was handed down, we felt that Jove had momentarily nodded and that the doctrine would not thereafter prevail. We have seen, however, that the case is relied on in the Headlight opinion, and it seems to have influenced the court in the Minnesota Rate Cases. In these cases (230 U. S. 352) it was urged that state regulation of intrastate rates was precluded upon the record showing that the State's action as to such rates created discrimination against interstate commerce and that section 3 of the federal act prohibited discrimination of this sort. The Court rejected the contention, saying (p. 419):

> "If it be assumed that the statute should be so construed, and it is not necessary now to decide the point, it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought wthin its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts."

The court goes on to declare that it would be destructive of the purpose of the act were the courts to undertake to pass upon the question of discrimination without preliminary action by the Commission, citing the Abilene case, 204 U. S. 426. But, implicate in the quoted language is the view that notwithstanding it be assumed that Congress had prohibited carriers from discriminating against interstate in favor of intrastate commerce and that power had been conferred upon the federal Commission to prevent such discrimination, yet that the State might by fixing intrastate rates bring about results antagonistic to the federal statute without power in the courts to interfere and to declare the State an intruder upon the federal domain, if the federal Commission had not first passed on the matter and found that unlawful discrimination existed.

This brings us to the Shreveport case (Houston & Texas Ry. Co. v. U. S., 234 U. S. 342); but, before discussing that case, we remark that the Larabee Mills case is cited in the Minnesota opinion (p. 421) in support of the proposition that "the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject."

In the Shreveport case (supra), the decree of the Commerce Court upholding an order of the Interstate Commerce Commission condemning the discrimination created in favor of intrastate commerce against interstate commerce by the Texas Commission in fixing intrastate rates was affirmed by the United States Supreme Court, on the ground that action by the Interstate Commerce Commission nullified the state action, the Minnesota cases being distinguished on that ground, the court saying (pp. 358-9):

> "Here, the Commission expressly found that unjust discrimination existed under substantially similar conditions of transportation and the inquiry is whether the Commission had power to correct it. We are of the opinion that the limitation of the proviso in section one does not apply to a case of this sort. The Commission was dealing with the relation of rates injuriously affecting, through an unreasonable discrimination, traffic that was interstate. The question was thus not simply one of transportation that was 'wholly within one State.' These words of the proviso have appropriate reference to exclusively intrastate traffic, separately considered; to the regulation of domestic commerce, as such. The powers conferred by the act are not thereby limited where interstate commerce itself is concerned. This is plainly the case when the Commission finds that unjust discrimination against interstate trade arises from the relation of intrastate to interstate rates as maintained by a carrier subject to the act. Such a matter is one with which Congress alone is competent to deal, and, in view of the aim of the act and the comprehensive terms of the provisions against unjust discrimination, there is no ground for holding that the authority of Congress was unexercised and that the subject was thus left without governmental regulation."

Now, it might be possible to distinguish the Larabee Mills case from the situation with which this note deals by saying that in the Larabee case the State was not attempting to regulate the

subject of discrimination against interstate commerce, a subject over which control rested in the federal Commission, while here both the State and federal Government are dealing with the same subject matter in the same aspect and for the same purpose, namely, promoting the safety of operation of railroad engines. But it must not be ignored that the Supreme Court shows in its decisions a tendency to approach such a subject from the standpoint of considering whether as a practical matter the regulation cannot be allowed to stand consistently with the control exerted by Congress and it must be admitted, looking at the subject in this light, that, practically speaking, state laws prescribing headlights and other such appliances may be allowed to be operative unless and until the Interstate Commerce Commission takes some action involving a clash, without involving confusion. It should be mentioned in this connection that in the Georgia Headlight case the Supreme Court rejected the contention that the state statute was invalid as a burden upon interstate commerce because of the possibility of varying state requirements which would create a great inconvenience and expense; and so an argument based on the possibility of expense and waste in case a state law should prescribe a certain sort of equipment or appliance and thereafter the federal authorities should prohibit its use might not have much weight with the court.

The cases above discussed come as close to the subject matter of this note as one can get, but for the sake of such light as they may possibly shed upon the matter the following authorities may be referred to:

Northern Pacific Ry. Co. v. Washington, 222 U. S. 370:

In this case the railroad company was subjected to a penalty for violation of a state "hours of service" law, effective June, 1907, the matters out of which the penalty arose having taken place in July, 1907. The United States Supreme Court reversed the judgment of the state courts and held that the federal "hours of service" act, approved March 4, 1907, excluded state legislation from the field, regardless of any actual conflict between the provisions of the two acts and although the federal act did not become effective until March, 1908. It declared that Congress had manifested its purposes to take exclusive control of the field from the date of the enactment of its statute and that the year between the approval of the act and its going into effect was given the carriers in order that they might prepare to meet the new conditions.

Erie R. Co. v. New York, 233 U. S. 671:

In this case the railroad company was found guilty in the state courts of a violation of the New York Labor Law in permitting a telegraph operator engaged in interstate commerce to be on duty more than 8 hours (namely, 12 hours). The United States Supreme Court held that the conviction could not be justified because Congress had taken exclusive control of the subject of the hours of labor of employees of railraod companies employed in interstate commerce, rejecting the contention that the state law should be permitted to stand because it simply supplemented the federal law in that it forbade the employment for more than 8 hours which period was within the 9 hours named in the federal statute.

We quote from the opinion language which one maintaining that the federal Locomotive Inspection Act is exclusive of state laws of the kind in question would find quite usable (p. 683):

> "The 'hours of service' law of March 4, 1907, is the judgment of Congress of the extent of the restriction necessary. It admits of no supplement; it is the prescribed measure of what is necessary and sufficient for the public safety and of the cost and burden which the railroad must endure to secure it."

Quarantine cases—(Missouri, etc. Ry. Co. v. Haber, 169 U. S. 613; Reed v. Colorado, 187 U. S. 137; Asbell v. Kansas, 209 U. S. 251):

Of these cases suffice it to say that, under the decisions of the Supreme Court, the States are allowed to supplement the federal laws and regulations and apparently state laws and regulations are valid unless their operation actually clashes with the provisions of federal law, or regulation or action thereunder by the federal officials charged with administering the law. The quarantine decisions tend, then, to support the view that the States may continue to regulate appliances on railroad engines in the absence of action by the Interstate Commerce Commission or its agents inconsistent with the operation of state law. It is open to the Supreme Court to find in the Locomotive Inspection Act no purpose to exclude state action if not, as a practical matter, in conflict with the exercise of the federal control, just as it has held in connection with quarantine matters. It should be stated, however, that quarantine matters seem to be regarded by the Supreme Court as to an extent sui generis and to be distinguished from the situation with respect to locomotive appliances in that, in the nature of the case, local conditions play a greater part in dealing with quarantine matters, and this consideration is stressed by the Supreme Court in ascertaining the intention of Congress in respect to how far its quarantine legislation is exclusive of state control.

Reference may also be made to Savage v. Jones, 225 U. S. 501, which involves the question of the validity of an Indiana statute which was attacked as being an invasion of the field occupied by the federal Pure Food Law. The Supreme Court, in upholding the state statute, emphasized the fact that not only could the state and the federal acts stand together without actual conflict, but that the purposes of the acts were different. On the other hand, state laws regulating engine appliances and the federal act have a common purpose, as hereinbefore pointed out, namely, promotion of the safety of those coming into contact with railroad operation.

There are, of course, many other cases involving questions of the conflict of the federal and state authority, but the cases herein referred to are believed to indicate the law as fully as if all the cases were discussed.

It would seem, upon principle, that state laws regulating locomotives and their appliances with a view to safety of operation are superseded by

the recent federal act; but that, in the absence of conflicting action by the Interstate Commerce Commission or its agents, it may be that state laws will be permitted to stand, in view of the tendency of the Supreme Court to uphold state statutes of this sort when such a holding would not create an unworkable situation from a practical standpoint, and in view of the fact that the way is open to the court, under its decisions, to apply the doctrine of the Larabee case and assign this case to the class of cases in which the Georgia Headlight case falls.

Note: Since the above was written, the Interstate Commerce Commission (under date of December 26, 1916), issued the following order as to locomotive headlights:

> "29. Locomotives used in road service.—Each locomotive used in road service between sunset and sunrise shall have a headlight which shall afford sufficient illumination to enable a person in the cab of such locomotive who possesses the usual visual capacity required of locomotive enginemen, to see in a clear atmosphere, a dark object as large as a man of average size standing erect at a distance of at least 800 feet ahead and in front of such headlight; and such headlight must be maintained in good condition.
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> "Each locomotive used in road service, which is regularly required to run backward for any portion of its trip, except to pick up a detached portion of its train, or in making terminal movements, shall have on its rear a headlight which shall meet the foregoing requirements.
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> "Such headlights shall be provided with a device whereby the light from same may be diminished in yards and at stations or when meeting trains.
>
> "When two or more locomotives are used in the same train, the leading locomotive only will be required to display a headlight."
>
> "31. Locomotives used in yard service.—Each locomotive used in yard service between sunset and sunrise shall have two lights, one located on the front of the locomotive and one on the rear, each of which shall enable a person in the cab of the locomotive under the conditions, including visual capacity, set forth in Rule 29, to see a dark object such as there described for a distance of at least 300 feet ahead and in front of such headlight; and such headlights must be maintained in good condition."
>
> "It is further ordered, That the said rules numbered 29 and 31 shall apply to all locomotives constructed after July 1, 1917, and for locomotives constructed prior to that date the changes required by the above rules shall be made the first time locomotives are shopped for general or heavy repairs after July 1, 1917, and all locomotives must be so equipped before July 1, 1920."

This constitutes an occupation of the field by federal regulation, so far as locomotive headlights are concerned, and excludes the State. The Interstate Commerce Commission has also prescribed rules for locomotive appliances other than headlights.

CONTRIBUTOR.

Carriers—Carriage of Passengers—Negligence of Passengers — Contributory Negligence. — Deceased, a passenger on a train, was notified by the brakeman who had promised to let him off on the side of the train opposite from the station that his stop had been reached. The brakeman opened the door and trap, the train being a vestibuled one, and, without waiting for a stop, deceased prepared to alight, starting down the steps holding to the rail on the opposite side from the direction in which the train was going, and carrying his grip in his other hand. He either stepped off or was, in trying to recover himself at the last moment, thrown from the train, his hold on the rail turning him with his back towards the engine, so that his body swung outward and his grasp on the rail was broken. HELD, that deceased was guilty of contributory negligence as a matter of law in attempting to alight while the train was in motion; for an adult passenger, who knowingly and unnecessarily attempts to alight from a train while it is in motion, ordinarily is chargeable with contributory negligence as a matter of law, and deceased's manner in going on the steps was negligence. Murray et al. v. Southern Pac. Co., 236 Fed. 704.

Master and Servant—Simple Tool Doctrine.—Plaintiff was one of three section hands who were engaged in cutting in two a steel rail with a cold chisel. One of plaintiff's co-employees was holding the chisel and the other striking the chisel with a sledge hammer, while the plaintiff a few feet from these two was holding the rail and turning it when told to do so. The head of the chisel from constant blows was battered, with little frazzles sticking off the edge. In the progress of the work a sliver of steel punctured plaintiff's eye and put it out. It was not shown with absolute certainty where the particle of steel came from but the only reasonable inference from the evidence was that it came from the chisel. HELD, that the battered condition of the chisel, which was open and obvious and which was a condition which resulted from its use and was necessarily better known to those who used it than to the master, did not constitute negligence as to plaintiff. Southern Railway Company v. Buford (Va.), 90 S. E. 617.

Carriers of Goods—Duty To Furnish Tank Cars.—The law does not impose upon common carriers the duty of furnishing cars of special types having no reference to the safety of transportation. Hence, an order by the Interstate Commerce Commission to a railroad company requiring it to provide itself with, and furnish to a complaining shipper, tank cars upon reasonable request, for the transportation of petroleum, is beyond the authority of the Commission, and may be enjoined. United States and Interstate Commerce Commission v. Penna R. Co., decided by U. S. Supreme Court, December 11, 1916.

MILEAGE BOOK STIPULATIONS BINDING — ADMISSION TO TRAIN ON PRESENTATION OF TICKET ALONE—EJECTION OF PASSENGER.

The following decision was rendered November 25, 1916, by the Supreme Court of Tennessee in the case of Southern Railway Company v. Kelly. As it will not be officially reported it is reprinted in full:

OPINION.

Kelly, the plaintiff below, was employed by one J. Burkhart, to do some work for him at Greeneville, Tennessee. Kelly lived in Knoxville and Burkhart undertook to furnish him transportation to Greeneville. Burkhart had a mileage book over the Southern Railway and in exchange for his scrip, procured a ticket to Greeneville. This ticket, according to the contract embodied in the mileage book and by stipulation printed on the face of the ticket, was not good for passage unless presented along with the mileage book itself.

Burkhart gave this exchange ticket to the plaintiff below with instructions to the latter to proceed to Greeneville. The plaintiff boarded one of the Railway Company's trains at Knoxville, being directed to that train by the gateman at the Knoxville station, who examined the ticket and admitted plaintiff into the train shed. The plaintiff did not know of the rule of the Company and the contract between the company and the purchaser of the mileage book requiring the presentation of the mileage book along with the tickets issued thereupon.

After the train upon which plaintiff took passage had proceeded two or three miles, the ticket collector called upon plaintiff for his transportation and plaintiff tendered him the ticket received from Burkhart. The collector then asked to see plaintiff's mileage book and plaintiff replied that he had no mileage book and never had possessed one. The collector then explained matters to plaintiff and told plaintiff he would have to leave the train at the next stop unless he paid his fare to Greeneville. Plaintiff had no money and at the next stop, Jefferson City, about thirty miles from Knoxville, he left the train. Plaintiff applied for help to the company's agent at Jefferson City but the latter said he could do nothing for him and plaintiff walked back to Knoxville. He says that it took him all night and he was very tired and suffered certain injuries by reason of his exposure and exertion.

A recovery is sought on the theory that the railway company breached its duty in not putting plaintiff off the train immediately upon the discovery by the ticket collector that plaintiff's ticket was not good. Plaintiff asked that he be put off then, when the train was only two or three miles from Knoxville, and he asked that he be put off at the first station out of Knoxville. Both of these requests were declined, the train officials informing plaintiff that the first stop made would be at Jefferson City. It appears that this was a fast train, making only a few stops.

There was a judgment below for plaintiff for one hundred and fifty dollars. The Court of Civil Appeals reversed this judgment and dismissed the case. We think that the latter court reached the correct result but we cannot concur in the reasoning of its opinion. The Court of Civil Appeals concluded that plaintiff was a trespasser and the railway company owed him no duty except not to wilfully or wantonly injure him.

This is a mistaken idea. Plaintiff was not a trespasser. He boarded the train in good faith, thinking he had a ticket that entitled him to passage to Greeneville. There is no suggestion of fraud on his part.

A person who by mistake gets on a passenger train which does not stop at his station, or is the wrong train, is not a trespasser but a passenger so far as to entitle him to protection against the negligence of the carrier.

4 R. C. L., p. 1029;

Louisville & N. Ry. Co. v. Garrett, 76 Tenn., 438.

The plaintiff, however, had no right to demand that the railway company change its schedule to accommodate him. The railway company was at no fault in the matter. Plaintiff was misled by Burkhart. The company's duty was to treat plaintiff with care to which a passenger is entitled while on the train and to let him off at the first stop the train was scheduled to make.

This is all the plaintiff could have required of the railway company if he had, by mistake, gotten on the train with a ticket for a station at which the train did not stop.

Trotlinger v. Railroad, 79 Tenn., 533.

He could certainly demand no more of the company when he was without valid transportation.

We do not think the admission of plaintiff into the train shed by the gateman and the direction of plaintiff by the gateman to the train which plaintiff boarded, improves the latter's case. The stipulation on the ticket and in the mileage book that tickets would not be honored unless presented along with the mileage book, was a reasonable stipulation. These mileage books entitle purchasers to carriage at reduced rates and such a special contract for carriage at reduced rates is valid and its provisions will be upheld when reasonable.

Warfield v. Railroad, 104 Tenn. 75.

The office of a gateman is primarily to direct passengers to the proper train. He handles large crowds in a limited time and the interests of the public would not be subserved by requiring a minute examination of the passenger's ticket and the reading thereof on the part of the gateman. The delay occasioned thereby to the traveling public would be intolerable.

Under such circumstances we think that the admission of the plaintiff by the gateman, and the direction with respect to the train plaintiff should board did not amount to a waiver of the conditions of the contract contained on the mileage book and the ticket. Such a result was reached by the Pennsylvania courts and we regard it as sound.

Bowers v. Railroad Co., 158 Pa. St., 302.

The judgment of the Court of Civil Appeals will be affirmed.

GREEN, J.

Filed November 25, 1916.

INTERSTATE COMMERCE COMMISSION DECISIONS.

DEMURRAGE

Shipments of lumber reached New Orleans just prior to the outbreak of the war in Europe, intended for export to Rotterdam, and arrangements had been made for the ocean transportation. When the war started the steamship lines refused to accept the lumber and after some delay it was stored in a warehouse in New Orleans with other lumber owned by complainants, exportation of which had been prevented. Some of this general stock has been sold and some exported but the lumber comprising the shipments in question was not separately stored and complainants are unable to state that any portion of it has been exported. Had they been exported they would have been entitled under the tariff to 10 days' free time at the port. Free time on domestic shipments held for switching orders is 24 hours. In collecting demurrage the shipments were treated as domestic. Complainants contend they were export shipments and entitled to 10 days' free time. HELD, they cannot be so considered. Adams v. Illinois Cent. R. Co., 41 I. C. C. R. 685.

Reconsigning instructions were given three days after a shipment was made, but on account of intermediate routing over the C. & O. the shipment could not be reconsigned as requested at the through rate to the reconsigned destination. While the shipment was enroute complainant requested defendant's representative at the point where the shipment was at that time, to reconsign to still another point, and complainant was notified that this reconsignment had been effected, but was later notified that the car was on hand at the original destination, and disposition asked for. To avoid expense of moving to destination to which it had been finally reconsigned, defendant requested complainant to find a purchaser, and this was done after demurrage had accrued. HELD, the demurrage should be refunded because assessed as the result of defendant's error in not observing reconsigning instructions. Middle West Coal Co. v. Chesapeake & O. Ry. Co., et al., 41 I. C. C. R. 723.

Complainant owns standard gauge track within its plant, which connects with defendant's track at two points. Prior to 1913 defendant performed the greater part of the switching and placing of cars within the plant. No demurrage was assessed on cars delivered until they had been placed at a point designated by complainant, nor on the cars unloaded within the plant when defendant was so notified, regardless of the position of such unloaded cars. Since 1913 defendant has delivered loaded cars on one interchange track at the plant and received empty cars at another interchange track and insisted that demurrage should begin 48 hours from the first 7 a.m. after the cars have been delivered upon the inbound interchange track and should continue until the cars are returned to the outbound interchange track, and demurrage has been assessed accordingly, on the theory that complainant is an industry performing its own switching, The tariff contained a rule that on cars delivered on interchange tracks of industrial plants performing their own switching, time will be computed from the first 7 a.m. following actual or constructive placement on such interchange track. Complainant insisted it was not such an industry, and the rule not applicable to it, and that it was the duty of defendant to place incoming cars at any designated point in the plant and accept delivery of outgoing cars at any accessible point within the plant. Evidence showed complainant had an engine which was used for hauling about the plant, but complainant contended it secured the engine to replace a system of ropes and pulleys used in moving cars between points within the plant, and not for switching to and from interchange tracks.

HELD, notwithstanding the purpose of its acquisition the engine is used generally as a plant facility; that the complainant is an industry performing its own switching and the tariff rule referred to above applied and the demurrage was properly assessed as above explained. American Creosote Works v. Illinois Cent. R. Co., 41 I. C. C. R. 751.

MISROUTING

Carload of sweet potatoes shipped from Pocomoke, Md., to Huntington, W. Va. Shipment delivered to the New York, Philadelphia & Norfolk, at Pocomoke, routed in the bill of lading "C. & O. delivery." It moved over the lines of the initial carrier to Norfolk and the C. & O. thence to destination. No joint rate applied over this route, the rate applicable being a combination of 34 cents: 14 cents to Norfolk and 20 cents beyond. A joint rate of 26 cents applied from Pocomoke to Huntington by way of the initial carrier to Delmar, Del., the P. B. & W., Penna. and P. C. C. & St. L. to Wheeling, W. Va. and the B. & O. beyond. Tariff publishing this joint rate provided that it would not apply to stations on the C. & O. "from stations on * * * New York, Philadelphia & Norfolk Railroad. No through rate in effect." However, the B. & O. provided in its tariff for absorption of the switching charges of the C. & O. at Huntington on traffic on which the B. & O. had participated in the line haul.

Urged by defendants that agent at Pocomoke was not in possession of the B. & O. tariff providing for the absorption of the switching charge and had no means of knowing that under the 26-cent rate the switching charge on delivery requested would be absorbed. Tariff publishing the 26-cent rate, however, provided that rates named therein were subject to the switching charges of delivering carriers, as well as any services or facilities published by any of the lines parties thereto.

HELD, the New York, Philadelphia & Norfolk misrouted the shipment, and was damaged to the extent of the difference between the charges paid and charges which would have been paid had the shipment been forwarded over the route via which the 26-cent rate applied. J. M. McCoach & Co. v. New York, P. & N. R. R. Co. et al., 42 I. C. C. R. 171.

Injuries to Employees in Yards—Doctrine of "Aerkfetz v. Humphreys."—Plaintiff was employed as hostler in a railroad yard and started home after finishing work across the yard and switching tracks. On his way he encountered a train of cars that had been run in on a track that day. He looked up and down and decided to cross the track underneath the cars, and started across underneath the drawhead connecting two of the cars. While in this position, an engine struck the train with sufficient force to move it, injuring the plaintiff. None of the employees of this train saw him. The Court affirmed judgment of non-suit in the lower court on the ground that the evidence failed to disclose that the defendant failed to discharge any duty it owed him. The Court in its opinion said:

> "The habit of employes going under trains instead of around them is not sufficient to charge an engineer with notice that plaintiff was under the drawhead. Plaintiff was a workman of long experience, and entirely familiar with the uncertain movements of engines and cars in the yards. The defendant had a right to move cars and engines on the yards as the necessities of its business required, and the only duty, under the circumstances, that it owed plaintiff was to refrain, if possible, from injuring him in case his precarious condition had been discovered. There is no pretense that plaintiff's condition was discovered, and as he was under the train, it is manifest it could not have been discovered by any one on the engine or tender. The defendant is not required to ring bells and blow whistles every time a car is shifted or a train moved on its switching yards, for the reason stated by Justice Brewer in Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758:
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> " 'The ringing of bells and the sounding of whistles on trains going and coming, and switch engines moving forwards and backwards, would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employes in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach. The engine was moving slowly, so slowly that any ordinary attention on the part of the plaintiff to that which he knew was a part of the constant business of the yard would have made him aware of the approach of the cars, and enabled him to step one side as they moved along the track. It cannot be that, under these circumstances, the defendants were compelled to send some man in front of the cars for the mere sake of giving notice to employes who had all the time knowledge of what was to be expected.' "

Hinson v. Atlanta & C. Air Line Ry. Co., (N. C.) 90 S. E. 772.

Federal Employers' Liability Act—Interstate Commerce.—Plaintiff was a freight conductor on defendant's road, having his principal run from Paducah south to Fulton, both in Kentucky, and the same day back from Fulton, north to Paducah. The train had generally and on this occasion had freight destined beyond the limits of the State. On the return trip it depended on what could be picked up, the engine and caboose sometimes going back alone. The accident happened when the train was returning to Paducah after having taken up a switch engine from the Fulton yards seemingly in need of repairs at the Paducah shops, and a pile driver and outfit on three flat cars and having in the rear behind the last the plaintiff's caboose. The pile driver was dropped on the way and the train thereafter consisted of two engines and the caboose. The plaintiff was sitting in the caboose making up a report of his trip out and back when the collision occurred. It was contended by the plaintiff that the return trip was merely the necessary complement of the trip out and that he was still engaged in interstate commerce because the train out had cars destined to Tennessee. It was held that the trips out and back were entirely separate and distinct and that as on the return trip, when he was injured, all the freight had domestic destinations, he was not engaged in interstate commerce within the meaning of the act. Illinois Central R. R. Co. v. Peery, decided by the Supreme Court of the United States on December 18, 1916.

Railroads—Negligence—Fright as an Element of Damage.—If a woman exercising ordinary care is walking across a railroad track at a street crossing in a city, attended by her two small children, discovers that she is about to be run down by an engine approaching the crossing in a grossly negligent manner, and leaps from the tracks and falls to the ground and one of her childen is run down and mangled by the engine in her presence and the woman on account of the fall sustained a shock and endures pain and suffering therefrom, the woman has a right of action for the wrong to herself.

But if the woman after crossing the railroad track did leap and fall and sustained no personal injury, the fact that she witnessed the mangling of the child and became frightened and suffered a severe nervous shock therefrom, would not entitle her to a recovery. Jackson v. Southern Railway Company, decided by the Supreme Court of Georgia, December 12, 1916.

Refusal By Consignee to Receive Shipment.—A consignee cannot refuse to receive a shipment because it has been damaged in transit, where the loss is only partial, and thereby increase the liability of the carrier. Whittington v. Sou. Ry. Co. (N. C.), 90 S. E. 505.

Injuries to Employees in Yard While Crossing Tracks Under and Between Cars—Assumption of Risk.—Where a railroad employee familiar with the method of operation and the conditions in yards, attempts to go between or under cars when he could have followed another and a safe way around the end of the cut, and is injured, he assumes the risk and cannot recover. Hinson v. Atlanta & C. Air Line Ry. Co., (N. C.) 90 S. E. 772.

Federal Employers' Liability Act—Interstate Commerce.—There was testimony to show that defendant was a common carrier by rail engaged in commerce between the states and that plaintiff was and for some time had been a yard conductor engaged in night duty at Briar Hill Yard, a mile or more west of Youngstown, Ohio; that he performed miscellaneous service in the way of shifting cars and breaking up and making up trains under orders of the yard master and had to apply frequently to the latter for such orders; that when any orders thus given had been performed he usually reported to the yard master's office for further orders; that on the night of the injury plaintiff, with a yard crew, took a freight car loaded with merchandise destined to a point without the State and a caboose which was not to go beyond the limits of the State, from the Briar Hill Yard eastwardly to the "FD Yard" in Youngstown where the freight car was placed on a siding so that it might be made up into a train by another crew; that they then took the caboose a short distance farther and placed it upon a siding; they then took the engine to a water plug and took water and returned with it to Briar Hill Yard; that on this return journey when the engine was slowed down near the yard master's office so as to enable plaintiff to report for further orders, all previous orders having been executed, plaintiff was injured in attempting to alight from the engine. It was also in evidence that the orders plaintiff would have received had he not been injured would have required him to immediately make up an interstate train and it was argued that his act at the moment of his injury partook of the nature of the work that but for the accidental interruption he would have been called upon to perform. It was HELD, however, that the true test is the nature of the work being done at the time of the injury. It was further contended that plaintiff at the time of the injury was performing an act directly connected with his previous act of placing an interstate car in the "FD Yard." In reference to this contention the court said:

> "And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and indivisible task. It turns upon no interpretation of the Act of Congress, but involves simply an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that in the proper exercise of the jurisdiction of this court in cases of this character, the decision ought not to be disturbed."

Erie Railroad Co. v. Welsh, decided by United States Supreme Court, December 18, 1916.

Carriers—Expiration of Time Limit of Ticket.—Plaintiff purchased from defendant an excursion ticket which stipulated that it was good for passage only on trains scheduled to reach her destination before a certain day and hour. Before beginning the return trip, plaintiff inquired of a ticket agent of the defendant as to the last train upon which she could return under her ticket. The train designated and taken by the plaintiff was not scheduled to arrive until after the time limited on the ticket. The time limit expired while she was on the train and she was forced to pay an additional fare from that point to her destination, or be put off. Plaintiff sued for damages for humiliation, etc. HELD, that the time limit stipulation was valid and binding upon the plaintiff and in the absence of express authority, no agent of the company had the power to extend the time limit in violation of the terms of the contract. Shoening v. Atlantic Coast Line Co. (Ga. App. 1915), 86 S. E. 940.

Where tickets are sold at reduced rates, this puts the purchaser upon inquiry, and affects him with notice that some special terms or conditions should be expected or looked for. Norman v. So. R. Co., 65 S. C. 517; Watson v. Louisville & N. R. Co., 104 Tenn. 194. He will be deemed by accepting the ticket to have assented to all reasonable terms, conditions, or stipulations in such ticket and consequently to be bound thereby. Baltimore Ry. v. Evans, 169 Ind. 410. A passenger cannot claim ignorance of such terms and if he fail to read them, he is nevertheless bound thereby. Fonseca v. Cunard Steamship Co., 153 Mass. 533; Steers v. Liverpool, N. Y. & P. Steamship Co., 57 N. Y. 1. It has been held that where a ticket stipulates that it is good only to a certain date, it does not necessarily mean that the journey must be completed by that date; it is sufficient if the passenger has begun his journey within the time limit although such time may expire before the actual completion threof. Lundy v. Cent. Pac. Ry. Co., 66 Cal. 191; Brian v. Ore. Short Line Co., 40 Mont. 109; Gulf, etc. Ry. v. Henry, 84 Tex. 678. The principal case extends the rule and holds that if there is an express stipulation in the contract (on the ticket) that the journey must be completed before a certain date, such a stipulation is valid and binding on the passenger.

Discrimination — Distribution of Cars — Cars Owned by Shippers.—The railroad company had a rule for the distribution of coal cars in time of shortage which provided that cars owned by shippers should not be charged against their distributive shares. Subsequent to the transactions involved in this suit in the State court but prior to the institution of suit, this rule had been held unreasonable by the Interstate Commerce Commission in a proceeding in which the plaintiff was not a party. It appeared that under the rule prescribed by the Commission as reasonable the plaintiff would have no cause of action. HELD, plaintiff was not entitled to recover. Also HELD, that the matter did not involve an administrative question and the State court had jurisdiction. Penna. R. R. Co. v. Stineman C. M. Co., decided by U. S. Supt. Ct., December 18, 1916.

Intoxicating Liquor—Shipments For Personal Use—State Regulation—Webb-Kenyon Act.—The state law of West Virginia did not prohibit the personal use of intoxicating liquor by a person in his home, but made it unlawful for carriers to bring such liquor into the state, or transport it between two points within the state, and made it unlawful for any person to receive intoxicating liquor from a carrier or to possess such liquor received directly or indirectly from a carrier.

The court, declining to decide whether the state could constitutionally forbid the personal use of intoxicating liquor, held that it undoubtedly had the power, notwithstanding the 14th Amendment, to forbid the manufacture and sale of such liquor and regulate the traffic therein, and as an incident to such power to restrict the means by which it could be obtained for personal use.

It was further held that the law was not unconstitutional as to interstate shipments. This conclusion was reached by virtue of the Webb-Kenyon Act of Congress prohibiting the shipment or transportation of intoxicating liquor from one state to another "to be received, possessed, sold, or in any manner used * * * in violation of any law" of such state. This law was held valid upon the principle that since Congress had full power to regulate commerce it could prohibit the interstate transportation of intoxicating liquor entirely and, therefore, a fortiori, could so restrict such transportation as to prevent violation of state laws.

It was argued that the Webb-Kenyon Act did not apply because the state law did not prohibit personal use of intoxicating liquor and the shipment (which was for personal use) was not intended to be "in any manner used" in violation of the state law. The court, however, held that the Webb-Kenyon act did clearly apply inasmuch as the state law made unlawful the receipt and possession of intoxicating liquor which had been transported by a carrier. Clark Distilling Co. v. Western Md. Ry. Co. et al., decided by United States Supreme Court, January 8, 1917.

Employers' Liability Act—Interstate Commerce—Car Repairer.—Plaintiff was injured while making repairs upon an engine which had been used in hauling freight trains containing both intrastate and interstate commerce. It was so used after the injury. The last time before the injury on which the engine was used was October 18, and it was again used after the injury on October 21. In holding that these facts were not sufficient to bring the case under the Act, the court said:

> "This is not like the matter of repairs upon a road permanently devoted to commerce among the States. An engine as such is not permanently devoted to any kind of traffic and it does not appear that this engine was destined especially to anything more definite than such business as it might be needed for. It was not interrupted in an interstate haul to be repaired and go on. It simply had finished some interstate business and had not yet begun upon any other Its next work, so far as appears, might be interstate or confined to Iowa, as it should happen. At the moment it was not engaged in either. Its character as an instrument of commerce depended on its employment at the time not upon remote probabilities or upon accidental later events."

Minneapolis & St. Louis R. Co. v. Winters, decided by the Supreme Court of the United States, January 8, 1917.

Accidents At Crossings—Duty To Look and Listen.—It is the duty of a traveller using a railroad crossing to look and listen at the last opportunity before entering the zone of danger and the circumstance that the gates are raised which are customarily lowered when a train is about to pass does not excuse failure to look and listen. Waterson v. Chicago, M. & St. P. Ry. Co. (Wis.), 160 N. W. 261.

Carriage of Passengers — Negligence—Proximate Cause.—Where plaintiff was carried beyond her destination and was compelled to alight at another station and to walk back, a sudden storm that caused her to get wet was an independent, intervening and unexpected cause, the act of God, which the negligence of the plaintiff did not set in motion and for which it was not liable. Garland v. Carolina C. & O. Ry. (N. C.), 90 S. E. 799.

Railroad—Injuries to Children Seen On or Near Tracks.—Where the engineer of a fast train saw children ahead who were running off from the track at a place where they had room to do so, he had a right to suppose that they would get out of the way and the railroad company was not liable because one of them catching her foot on a switch rod was killed by the train, it not appearing that the accident could have been avoided by the engineer after he discovered the child's peril. Wyrick v. Southern Railway Co. (N. C.), 90 S. E. 563.

Passenger—Loss of Valuable Personal Effects Taken Into Car.—Where a passenger takes personal effects with him into the car the carrier is required only to use reasonable care for their protection. And where such effects consist of large sums of money or other property of exceptional value the liability for even reasonable care does not extend to such money or property. In this case an action for loss of $5,000 worth of diamonds which were left by plaintiff in the berth above the one she was occupying, resulted in favor of the defendant. Pinkus v. Pittsburgh C. C. & St. L. Ry. Co. (Ind.) 114 N. E. 36.

Death—Right of Action—Release. — Under a statute giving an action for death by reason of wrongful act where none existed before and limiting the right of recovery to those cases in which the party injured would have been entitled to recovery if death had not ensued, a beneficiary of a decedent who had released the defendant could not recover. Irish v. Seaboard A. L. Ry. (S. C.), 90 S. E. 705.

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THE MEMORANDUM

Vol. II No. 7

LAW DEPARTMENT FEBRUARY, 1917 SOUTHERN RAILWAY COMPANY

LIABILITY FOR INJURIES TO BYSTANDERS WATCHING PROGRESS OF WORK.

In view of the large amount of construction work that is being done by Southern Railway Company in double-tracking its lines, erecting terminal, bridge, and other facilities, it may be timely to consider, briefly, the question of a railroad company's liability for injury to a bystander watching the progress of work. A valuable note on the subject is to be found in L. R. A. 1916F, at page 117.

The general rule is that a bystander, idler, or person who, in entering upon premises, is actuated by mere curiosity or interest in some process being carried on upon the premises, must be considered as a trespasser or bare licensee, in the absence of express or implied invitation to go upon the premises. It follows that the only duty owed to such person is that of not inflicting willful or wanton injury.

A very recent case supporting this view, and citing a number of American and English authorities, is that of Shafer v. Tacoma Eastern Railroad Company (Wash.), 157 Pac. 485, L. R. A. 1916F, 114. An attempt was being made to raise a derailed engine, and the operation attracted many passers-by, who crowded in upon the workmen until it was necessary for a police officer to drive them back, warning them of the danger. Appellant, who resided near the scene, finally took a position on the edge of the borrow pit, some 50 feet away from the derailed engine, and just off from the railway company's right of way. The method employed to raise the engine was to attach a cable from the wrecking train to the boiler and then pull toward the track with a rolling movement. In placing the cable around the engine boiler it was placed back of some lugs against which, on one of the pulls, the cable slipped. On making another pull the lug snapped and was hurled to where appellant was standing, inflicting the injuries complained of.

Plaintiff contended that his right of action was based upon the rule that those engaged in the use of machinery must use a proper degree of care to prevent injury to persons on adjoining property, and those passing on adjoining streets; but it was held that this rule had no application to the case in question, because of the lack of important essentials—failure to warn and lack of knowledge of the dangerous situation. Not only was the warning given, but plaintiff in his testimony in the court below admitted that mere curiosity attracted him to the scene. He testified:

> "I came over to see what was going on. I went out there to see something unusual, something great. I expected to see a demonstration; see something different from what I usually saw about lifting things. In the lifting of a big thing like that there was an element of danger connected with it; that something might break or give way that I would be apt to see if I was around in a safe place."

The Supreme Court of Washington, in denying appellant's appeal from judgment of nonsuit said:

> "Appellant was a mere licensee or volunteer, and his presence at the spot where he was injured is best understood by referring to his testimony previously quoted. It is this that determines the law against him. He appreciated the presence of danger, which means that the law charges him with the natural results of the thing he appreciated and understood. Knowledge of danger is, in law, knowledge of the dangerous results naturally and proximately flowing from that danger. * * * From his own testimony it is clear that appellant knew and appreciated the dangerous situation. In fact, that was one of the attractions exciting his curiosity and inducing his presence. Knowing he was submitting himself to a known danger would be a voluntary submission to the natural and proximate results flowing from that danger.
>
> "In determining respondent's negligence, we must determine the duty it owed to appellant, since negligence occurs only where there is a breach of legal duty. Not failing in this duty, responsibility for appellant's injury cannot be fastened upon respondent."

The appellant in this case further contended that his cause of action was analogous to those where persons upon adjoining property are injured by articles thrown from moving railway trains, but this contention was thus answered by the court:

> "Negligence in those cases is predicated upon the duty of a railway company to keep

its trains and other dangerous instrumentalities upon and within its right of way. This duty is due not only to owners of adjoining property, but to those who may be upon such property, anticipating no danger, and relying upon the duty of the railway company to protect them. The law always requires of any property owner the exercise of ordinary care in the use of his property and the agencies operated thereon, so as not to injure property or persons on abutting premises; but that duty is not extended to those who voluntarily and knowingly make themselves a part of a dangerous situation, attracted by no motive other than curiosity or amusement. Such persons must take the risk as they find it, and cannot successfully complain of the unskillfulness or lack of due care on the part of those engaged in the work."

Workmen were employed in excavating the earth for the foundation of a building, in the English case of Batchelor v. Fortescue (1883), L. R. 11, Q. B. Div. 474. In the performance of the work they used a steam crane and winch, to which was attached an iron bucket. The deceased was standing by, watching the men at work, when the iron bucket, in consequence of the breaking of the chain, fell upon him. It was held that there could be no recovery, for the reason that the deceased voluntarily subjected himself to all the risks attending his presence upon the scene.

In Downes v. Elmira Bridge Co., 179 N. Y. 136, 71 N. E. 743, it is said:

> "When one enters a place where work is going on, and he knows the nature of the work and the condition of the place, even if many others have been suffered to go there before him, he takes the risk of the operations of the workmen, who cannot reasonably be required to give further notice than the situation itself affords. Dangerous work in plain sight is notice to a mere licensee."

A person was standing upon the railroad company's land for the purpose of seeing a mail crane in operation, in the West Virginia case of Poling v. Ohio River R. Co., 38 W. Va. 645, 24 L. R. A. 215, 18 S. E. 782, when the arm of the crane broke, and the observer was injured thereby. The court in its opinion stated that, as a mere licensee, he was subject to the concomitant risks and danger of injury thus assumed, and the company did not owe him the duty of keeping the mail crane in suitable and safe condition; that the railroad company was liable only for such wanton injury as might be done to such licensee by the gross negligence of the company, its servants and employees. Continuing, the court said:

> "A mere sightseer, on no other business, goes into any one of the large modern factories in operation throughout the civilized world. It requires great care and watchfulness on his part, unfamiliar as he is with such places and things, to avoid danger and escape injury, although the place is reasonably safe and fit, and everything is carried on with due ordinary care; but unless there is wanton injury, the result of gross negligence, the owner is not liable. Why? The owner has set no trap for him; he did not induce, but only permitted, him to come; he is not there on business; the place and appliances belong to the manufacturing company; it was fixed for them and their employees; it suits them; by their knowledge and skill they avoid danger, though to those unskilled and unfamiliar it may be dangerous—dangerous to anyone, in fact; but it was not made for, and is not carried on for, any purpose with which the licensee has anything to do; if the injury is not wanton, the negligence is not gross, and the company is not liable, for it owed him no other duty, and that one has not been violated."

Chief Justice Stone of Alabama, in Montgomery & E. R. Co. v. Thompson, 77 Ala. 448, after referring to the common law duty resting upon all persons who own real estate on which the public is impliedly or expressly invited to enter that it shall be kept free from pitfalls, etc., and stating that all the property of a railroad, including its depots and adjacent yards and grounds, is its private property on which no one is invited or can claim the right to enter save those who have business with the railroad, says:

> "The rule of obligation is essentially different when the asserted rights of mere idlers, or sight-seers, are presented. To such the corporation owes nothing, beyond the observance of the duties of good neighborhood."

Plaintiff in the case of Indian Refining Co. v. Mobley (Ky.), 121 S. W. 657, applied to one of defendant's officers for permission to go through defendant's works and solicit insurance, which being granted him, plaintiff on several occasions wrote the insurance for defendant's employees. On the day plaintiff was injured he went into defendant's boiler room to solicit insurance from one of defendant's servants employed there, in accordance with such permission, and while there was injured by the explosion of the steam pipe resulting from its negligent construction. It was held that plaintiff was only a licensee, as to whom the defendant owed no duty except to refrain from willful acts of injury, and was therefore not liable for his injury.

In the Massachusetts case of Moffatt v. Kenny, 54 N. E. 850, 851, Knowlton, J., says:

> "Of course the land-owner is liable if he does him (the licensee) an intentional injury, or wantonly or recklessly exposes him to danger. . . . But we are of opinion that an owner is under no liability for an unsafe condition of his premises caused by a mere failure to use ordinary care for the safety of persons who may chance to go there by permission while he is using the place for his own proper purposes, and is

not intending needlessly to expose others to danger. Otherwise there would be no important distinction between his duty to licensees and his duty to invited persons." (Citing Zoebisch v. Tarbell, 10 Allen 385, 87 Am. Dec. 660; Plummer v. Dill, 156 Mass. 426, 32 Am. St. Rep. 463, 31 N. E. 128, and cases cited,

The same principle has been applied in the case of machinery in action in the course of the licensor's business. Bolch v. Smith, 7 Hurlst. & N. 742, 37 L. J. Exch. N. S. 201; Griffiths v. London & N. W. R. Co., 14 L. T. N. S. 797. Batchelor v. Fortescue, supra; Tolhausen v. Davies, 57 L. J. Q. B. N. S. 395; Larmore v. Crown Point Iron Co., 101 N. Y. 391, 54 Am. Rep. 718, 4 N. E. 752; Weitzman v. A. L. Barber Asphalt Co., 190 N. Y. 452, 123 Am. St. Rep. 560, 83 N. E. 477.

In the case of Larmore v. Crown Point Iron Co., just referred to, defendant was operating a machine for raising ore from its mine. The machine consisted of an upright or mast in which a lever was inserted, and the machine was worked by attaching horses to the lever, by which means a bucket was raised and lowered. While the bucket was being lowered, the lever, as a result of insecure fastening, was thrown out of the socket, and flying rapidly around, struck the plaintiff, a mere licensee. It was held in an able and lucid opinion that the defendant owed the plaintiff no duty to use ordinary care to see that the lever was properly fastened, and a verdict which had been rendered in the trial court for the plaintiff was set aside.

A boy, a licensee, in the Weitzman case, was struck upon the head by a barrel which, suspended by a rope, was being drawn from one part of the premises to another. It was held that the defendant did not owe to the licensee the duty to take sufficient precaution to warn the plaintiff of the danger.

In O'Brien v. Union Freight R. Co., 209 Mass 449, 95 N. E. 861, 36 L. R. A. (N. S.) 492, Mr. Justice Hammond, in delivering the opinion of the court, said:

> "As to trespassers and licensees the well settled rule is that the only duty of the owners or occupiers of land is to abstain from inflicting intentional or willful or wanton injuries. . . . The great weight of authority seems to be that as in the case of land so in the case of appliances thereon where danger is not concealed, the owner or occupier of the premises owes no duty to a mere licensee to take proper precautions to protect him, but is answerable only for injuries inflicted wantonly or willfully. And this is so whether the licensee falls against the appliance, or whether, by reason of the lack of ordinary care of the owner to keep it in repair, the appliance or some part of it strikes him."

In Cleveland, C. C. & St. L. R. Co. v. Ballentine, 84 Fed. 935, a boy of seventeen and a half years, impelled by curiosity, went upon the premises of a railway company to observe the burning of a train of tank cars, and voluntarily rendered assistance in preventing the spread of the fire to other property. He was injured by the explosion of one of the cars, the fire having been caused by the negligent misplacing of a switch. The court held that this negligent act or omission as to misplacing the switch was not in breach of any duty owned to Ballentine, inasmuch as he was two miles away at the time, and came upon the scene afterwards as, at best, a mere licensee, bound to take things as he found them, and assuming the risk of the situation. The court said:

> "Ballentine, impelled by curiosity to witness a great conflagration, went upon the grounds of the railway company, to the scene of it, in the face of obvious danger of explosion. He went without inducement or invitation, without legal right, and assumed the perils of the situation. He voluntarily and negligently exposed himself to danger. 'Volenti non fit injuria.' The railway company owed him no active duty—only the duty to abstain during his presence on the premises from positive wrongful act which might result in injury to him."

In addition to the authorities referred to, the following may be mentioned as supporting the proposition that the duty owed to a mere bystander or sight-seer, watching the progress of work, is merely that of refraining from willful and wanton injury:

Metcalfe v. Cunard S. S. Co., 147 Mass. 66, 16 N. E. 701.

Currier v. Dartmouth College, 117 Fed. 44.

Kroeger v. Grays Harbor Const. Co. (1914), 83 Wash. 68, 145 Pac. 63.

Dooley v. Mobile & O. R. Co., 69 Miss. 648, 12 So. 956.

Waterman v. Shepard, 21 R. I. 257, 43 Atl. 66.

Benson v. Baltimore Traction Co., 77 Md. 535, 20 L. R. A. 714, 39 Am. St. Rep. 436, 26 Atl. 973.

King v. Northern Nav. Co. (1912), 27 Ont. L. Rep. 79, 6 D. L. R. 69.

Wilmes v. Chicago Great Western R. Co. (1916, Wash.), 156 N. W. 877.

Cases of this sort are to be distinguished from those which fall into the class governed by the so-called "attractive nuisance doctrine," which deals with children not sufficiently mature or discreet to have legal capacity to assume a risk. This distinction is clearly drawn in the case of Wilmes v. Chicago Great Western Ry. Co., last above referred to.

February 13, 1917. L. E. J.

Violation of Act to Regulate Commerce—Recovery of Damages by Complaint Before Commission—Action in State Court For Damages to Business.—All damages properly attributable to the charging of an unreasonable rate may be recovered by complaint before the Interstate Commerce Commission, or by suit in the federal courts. And when the party injured has brought his complaint before the Commission and recovered and collected a judgment, he cannot then sue in the State court for general damage to his business growing out of the charging of the unreasonable rate. Louisville & Nashville R. Co. v Ohio Valley Tie Co., decided by U. S. Sup. Ct., Dec. 18, 1916.

Master and Servant—Assumption of Risk Arising from Servant's Physical Unfitness.—Plaintiff, who had been employed by defendant at its furnaces, knew that he was subject to epileptic fits and of the dangers of falling into the hot iron while at work. He was ordered by the superintendent to do certain work, in doing which he fell and was badly burned. The Court, holding the master was not liable, said:

> "So far as their own safety is concerned, persons not under contractual disability should be, and are, allowed to determine for themselves whether their physical infirmities, known to themselves, shall debar them from any particular employment. According to the nature and degree of their infirmities, they must be more or less exposed to dangers, naturally resulting from their attempt to serve, in almost any of the modern industries. It is no doubt a hard choice, but such persons must estimate for themselves the chances of injury, and it would be unjust as well as illogical to visit the consequences of their choice upon their employers. It may be a matter of delicacy as well as difficulty for the employer to undertake in each case to determine the nature and extent of the malady or infirmity of one who offers to work, or the likelihood of injury resulting therefrom: and we think the employer may, without liability, legal or moral, accept the judgment of a would-be servant who knows his own condition.
>
> "Nor would the imposition of liability upon the master in such cases be either politic or humane, even from the servant's point of view, since it would inevitably result in depriving of a livelihood many afflicted persons who have no choice but to labor, and who are impelled by experience or necessity to choose the more lucrative, if more dangerous employment."

Tennessee Coal, Iron & R. Co. v. Moody, (Ala.), 68 So. 274.

Carriers of Goods—Agreed Valuation—Theft by Agent of Carrier.—Plaintiff shipped an express package worth about $2000 under a contract, made in consideration of a lower rate duly established by a tariff filed with the Interstate Commerce Commission, whereby it was agreed that the value of the package was $50. The package was converted by the employees of the Express Company for their own benefit. HELD, That the plaintiff could not recover in excess of the $50 agreed valuation. D'Utassy v. Barrett (N.Y.) 114 N. E. 786.

Railroads—Injuries from Unblocked Frogs.—Following Southern Pac. v. Seley, 153 U. S. 145, the Circuit Court of Appeals, Eighth Circuit, holds that a railroad is not liable for an accident due to an unblocked frog though it may be liable where a switchman caught his foot in a frog which had been originally blocked but which had been allowed to fall into disrepair. St. Louis Merchants Bridge Terminal v. Schurman, 237 Fed. 1.

Handholds—Absolute Duty of Making Secure—Period for Compliance with Law.—Williams, a switchman, while mouting by ladder to the top of a box car to set a brake, fell to the ground when the handhold at the top of the ladder gave way. The railroad conceded that the plaintiff's case as pleaded and proved entitled him to recover under the supplement to the Safety Appliance Act of 1910 if Section 2 of that Act was in effect when the accident occurred on March 15, 1913; but the railroad claimed that this section was not at that time in effect because suspended until July 1, 1916, by order of the Interstate Commerce Commission under authority of proviso of Section 3 of the Act. Section 2 provides that after July 1, 1911, all cars having ladders shall be equipped "with secure handholds or grabirons on their roofs at the tops of such ladders." Section 3 provides that the Commission shall establish specifications for the appliances provided for by Section 2 and by proviso permits the Commisison to extend the period for compliance "with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this Act." On March 3, 1911, the Commission established specifications for such appliances and granted an extension of five years from July 1, 1911, in which to bring the appliances into compliance with the standard prescribed. Overruling the contention that the Commission's extension of the time of compliance suspended the effect of Sec. 2 of the Act, Mr. Justice Clarke said:

> "The congressional purpose in enacting Section 2 of the Act is very plain. At the time the Act was passed railroad carriers had in service many box cars, requiring for their proper use secure ladders and secure the tops of such ladders, and the purpose of this section clearly is to convert the handholds or grabirons on their roofs at general legal duty of exercising ordinary care to provide such safety appliances and to keep them in repair, into a statutory, an absolute and imperative duty, of making them 'secure' and to enforce this duty by appropriately severe penalties."

The effect of the proviso was held to be only to grant the Commission discretion as to the time when the standardization should be accomplished, not to grant the Commission power to suspend the operation of Section 2 of the Act. Judgment for plaintiff affirmed. Illinois Central R. Co. v. Williams, decided by the Supreme Court of the United States January 8, 1917, No. 637 of October Term, 1916 (not yet officially reported).

Carrier of Livestock—Released Valuation—Proof of Tariff.—In an action against a carrier for damage to an interstate shipment of livestock the defendant relied upon the released valuation and referred to the recitals of the livestock contract, which was in evidence, to the effect that the shipment was made at a reduced rate in consideration of the shipper's acceptance of the conditions of the contract, one of which conditions was the limited valuation. HELD, that the bill of lading established the defense prima facie, since it must be presumed, in the absence of evidence to the contrary, that the alternative rates applying according to whether the shipment was released or unreleased were in accordance with tariffs filed with the Interstate Commerce Commission. L. & N. R. Co. v. Hobbs (Tenn.) 190 S. W., 461.

Demurrage—"Privately Owned Track"—"Railroad Service."—The interstate demurrage tariff provided that cars held for or by consignors or consignees for loading, unloading, etc., should be subject to demurrage, except "private cars on tracks of the owner, or on privately owned tracks of the consignor or consignee, when used for the transportation of commodities which the owners of the cars produce or in which they deal." HELD, a spur track constructed by the railroad to an industry under an easement granted by the industry, title thereto being vested in the railroad company, was not a "privately owned" track within the meaning of the demurrage rule.

The tariff provided that "private cars while in railroad service, whether on carrier's or private tracks" should be subject to demurrage to the same extent as cars of railroad ownership. HELD, that tank cars owned by a refining company which the railroad was allowed to use in consideration of a mileage payment on loaded and empty movements, were in railroad service, and subject to demurrage if held for storage purposes on the spur track of the refining company beyond the allowed free time. National Refining Co. v. St. Louis I. M. & S. Ry. Co., 237 Fed. 347.

Railroad Embankments—Impounding Surface Water.—Defendant's predecessor constructed a solid embankment over marshy ground, which embankment was maintained for over eight years before defendant purchased the right of way at foreclosure sale. The embankment sometimes in cases of high water impounded water upon the adjoining land, though there were no well defined water courses. Thereafter plaintiff purchased adjoining land and neither plaintiff nor his lessee requested defendant to remove the embankment or to provide outlets. HELD, that defendant was not liable for injuries to the crops of plaintiff and his lessee by reason of the impounding of the water. Union Pacific R. Co. v. Campbell, 236 Fed. 708.

Railroads—Look and Listen Rule.—Plaintiff's decedent approached a station to take a train. She must have seen and heard a passing freight train and have appreciated that it would hinder her hearing the approach of a passenger train. If she had looked she could have seen the incoming passenger train, which struck and killed her, over one hundred feet away in time to have stopped before going on the track. HELD, That decedent was guilty of contributory negligence and that a directed verdict for the defendant was proper. Nashville, C. & St. L. Ry. v. Parks (Tenn.), 189 S. W. 695.

Carrier of Livestock—Caretaker With Shipment—Burden of Proof.—Where the contract for the shipment of livestock provided that the shipper should accompany the shipment and take care of the stock, the burden is on the plaintiff in case the stock are injured by lack of feeding and watering, to show that the carrier was negligent. Ft. Worth & D. C. Ry. Co. v Allen (Tex. Civ. App.), 189 S. W. 765.

Rate Regulation—Enjoining Order of the Commission After It Has Gone Into Effect—Increasing Rates.—Rates on logs between certain points voluntarily established by the carrier, had been in effect for thirteen years when the carrier published new rates considerably higher. Lumber companies which would be affected by the higher rates filed a petition with the Interstate Commerce Commission to suspend the new rates, which was done and the railroad required to establish lower rates, which, however, were higher that the original rates. Under the Commission's order the rates thus established were required to be maintained for two years.

After these rates had gone into effect the lumber companies brought a suit in equity in the federal court to enjoin the order of the Commission requiring the establishment and maintenance of said rates, and showed that the increased rates were very detrimental to their business, the establishment of which had been induced by the low rates originally in effect. HELD, the reasonableness of the rate was a question of fact to be determined by the Commission, whose decision could not be reviewed by the court, unless it plainly appeared that its conclusion involved an error of law upon undisputed facts, or was supported by no substantial evidence. The fact that the carrier had charged an unreasonably low rate in the past is no ground for denying the right to establish a reasonable rate for the future, notwithstanding shippers may be injured by the change. McLean Lumber Co. v. U. S. 237 Fed. 460.

Master and Servant—Assumption of Risk in Obeying Orders.—Plaintiff was injured by a flying spike which he had struck with a spike hammer. Ordinarily defendant furnished new spikes with which to fasten the rails to the ties, but on this occasion new spikes were not furnished and plaintiff was ordered by the section foreman, over his protest, to use the old spikes and to drive them at once. Liability was denied, the court holding that:

> "In order for a servant to recover for an injury on the ground that it resulted from his compliance with a direct order of his master, or of his master's representative, the servant must show the the order was a negligent one under the circumstances. If the order was negligent, and the servant knew of the peril of complying with it, or if he had equal means with his master of knowing of the peril, or by the exercise of ordinary care might have known thereof, then he cannot recover for an injury received in complying with the order."

Hightower v. Southern Ry. Co. (Ga.), 91 S. E. 52.

Crossing Accident—Speed of Train.—In an action for death growing out of a railway accident in the country, in the absence of any statute or ordinance regulating the speed, it is proper for the court to instruct the jury that a speed of sixty miles an hour is not of itself negligence. Larabee v. Western Pac. Ry. Co. (Cal.), 161 Pac. 750.

ACCIDENTAL INJURIES TO EMPLOYEES—NORTH CAROLINA RULE.

An accident is "an event from an unknown cause" or "an unusual an unexpected event from a known cause," "chance, casualty."
Crutchfield v. Railroad Company, 76 N. C. 320.

Injuries in the following cases in North Carolina were held to have been caused by accidents, and the employers not liable in damages:

Plaintiff and three other men were engaged in loading a car with timbers of an old bridge. One pice, eight inches thick, sixteen inches wide and thirty feet long was being loaded. One end was lifted up from the ground and put on the car. One of the men put one end of a piece of scantling on the car under the timber and the other end on his shoulder to hold the timber on the car until the other end of the timber could be raised up and put on the car; by some means while the plaintiff and others were attempting to put the timber on the car the scantling slipped, the timber fell and plaintiff was injured.
Bryan v. Railroad Co., 128 N. C. 387, 38 S. E. 914.

Where the injured party was holding one hammer on an iron key which was being driven by another with a hammer, and a fragment of steel flew off and struck plaintiff in the eye causing injury, there being no evidence of any known defect in the hammer.
Martin v. Mfg. Company, 128 N. C. 264, 38 S. E. 876.

A piece of iron forming a part of an engine had been loosened by an employee unknown to plaintiff, and while plaintiff was at work about the engine the piece of iron fell and in some way rebounded and struck plaintiff who was standing two feet away.
Raiford v. Railroad Co., 130 N. C. 597, 41 S. E. 806.

Where plaintiff and three other men were to bring down a heavy piece of machinery under orders given by their employer, none of them having knowledge of how to do the work, and while so engaged the piece of machinery fell from some unknown cause and injured the plaintiff.
Alexander v. Mfg. Co., 132 N. C. 428, 43 S. E. 1003.

When it appeared that plaintiff was injured while unloading rails from a car caused by one end of a rail re-bounding in an unusual and unexpected way; that the method employed was considered the safest way; that the car had been properly loaded and sufficient help was furnished.
Lassiter v. Railroad Co., 150 N. C. 483, 64 S. E. 202.

Where a large hammer which had been in use for some time and had never given any trouble, flew off the handle while being used to drive a rivet set.
Dunn v. Railroad Co., 151 N. C. 313, 66 S. E. 134.

Where the injured party was hurt by the falling of a board 16 feet long, 1 foot wide, and one inch thick which struck certain bumpers with such force as to move the same, on account of loose collars in which they were placed, thus starting a truck in motion, which injured the plaintiff.
Carter v. Lumber Co., 129 N. C. 203, 39 S. E. 828.

Plaintiff was injured while unloading telephone poles from a car. The method used was to cut the standards on one side of the car about half way through, then to send men up on top of the poles to cut the wires which ran across the poles and held the standards on both sides of the car. Usually when the wires were cut the standards would give way and the poles roll off on that side. When the plaintiff had cut the last wire and had gotten on the side of the car on which the standards had not been cut the standards on both sides of the car give way, the poles rolled off, and plaintiff was injured.
Keck v. Telephone Co., 131 N. C. 277, 42 S. E. 610.

While the plaintiff was working as a lineman, and he and others were engaged in carrying a heavy pole, two on one side and two on the other, having a handspike under the pole on which it was lifted by them, and those on one side were taller than on the other side, and also on higher ground, in consequence of which when the pole was lifted up it turned over and threw more weight on plaintiff injuring him.
Brookshire v. Electric Co., 152 N. C. 669, 68 S. E. 215.

Plaintiff was cleaning windows of a car, and in attempting to raise a window which had stuck and was difficult to move, her hand slipped off and went through a window pane, and was cut by the broken glass.
House v. Railroad Co., 152 N. C., 397, 67 S. E. 981.

Where plaintiff and three others were carrying a guard rail, two at each end in the usual manner, and the end opposite plaintiff was dropped, which jerked plaintiff's end and it fell on his foot.
Howell v. Railway Co., 153 N. C., 184, 69 S. E. 59.

While engaged with others in leveling crossties on a flat car, plaintiff was injured by one of the ties rolling from the pile.
Simpson v. Railroad Co., 154 N. C. 51, 69 S. E. 683.

Where plaintiff was injured by the falling of the joists of an old shed which he was taking down, caused by his loosening the rafters.
Rumbly v. Railway Co., 153 N. C. 457, 69 S. E. 416.

Plaintiff, while working as a civil engineer for a railroad company, and while walking along the track he stepped on a crosstie from which a piece broke off, and his foot slipped down between the ties, fell and was injured.
Nelson v. Railroad Co., 170 N. C. 170, 86 S. E. 1036.

Where plaintiff and another were engaged in repairing cars and loosened one side which fell and injured him, because the uprights which held it up were rotten.

Bunn v. Railroad Co., 169 N. C. 648, 86 S. E. 503.

Where a wokman in driving a spike in a railroad tie was injured because the face of the hammer in use was worn, and slipped off the head of the spike, striking the tie two inches below, so that the workman sprained his back.

Morris v. Railroad Co., 88 S. E. 818, ... N. C. ..

JULIUS C. MARTIN.

Asheville, N. C., February 10, 1917.

Federal Employers' Liability Act—"Engaged in Interstate Commerce."—The Federal Employers' Liability Act does not necessarily apply to a person in all the details of his employment, as he may have duties including both interstate and intrastate commerce. Hence, where plaintiff at the time of injury was engaged in loading old rails that had at some time been taken out of the track and were lying on the right of way, he was not at that time engaged in interstate commerce and suit was improperly brought under the federal act. Cincinnati, N. O. & T. P. Ry. Co. v. Hansford (Ky.), 190 S. W. 690.

Carrier—Measure of Damage.—Plaintiff shipped a soda fountain actually worth $250.00, which he had purchased at a judicial sale for $100.00. The bill of lading provided that in case of loss or damage the measure of damages should be computed "on the basis of the value of the property, being the bona fide invoice price, if any, to the consignee at the place and time of shipment." In an action for destruction of the fountain it was held that plaintiff could not recover over $100.00. Wilson v. Chicago Great W. Ry. Co. (Mo. App.), 190 S. W. 22.

Earth Taken from Right of Way—Measure of Damages.—A railway company wrongfully removes earth from its right of way and transports it to a distant point for other use. The character and measure of damages is the value of the earth at the time and place of severance and it is not to be enhanced by the expense of excavating and hauling to other places for disposition and use. Southern Railway v. Meaher, U. S. Circuit Court of Appeals. Fifth Circuit. Decided January 2d, 1917.

Discrimination—Contract for Certain Rate Valid When Made.—Where a railroad company agreed with a planing mill that in consideration of the latter locating its plant on the railroad's line, it would perform switching at a certain rate, subject to change as required by law, said contract having been lawful at the time it was made, the planing mill cannot recover damages for injury to its business, by reason of the railroad company having increased its rates, after passage of the Act to Regulate Commerce, so as to avoid discrimination between the planing mill and other shippers. Carter Planing Mill v. New Orleans, M. & C. R. Co. (Miss.) 72 So. 884.

Freight Charges—Liability of Consignor.—The defendant had purchased a carload of lead at the request of a commission house, and shipped it as directed. Freight was not prepaid and the bill of lading provided that the "owner or consignee shall pay the freight." The carrier through error failed to collect the full tariff charges from the consignee. HELD, shipper was liable for the undercharge. Yazoo & M. V. R. R. Co. v. Picher (Mo. App.), 190 S. W. 387.

Crossing Accidents—Duty to Stop, Look and Listen.—In an action for personal injuries to the driver of an automobile at a public crossing it appeared that the trees of an orchard and a heavy growth of sun flowers and weeds obstructed the view and made it impossible for the driver to see up and down the track until he was almost on it. Plaintiff testified that he did not stop, and that, he done so, he could not have seen the train unless he had gotten out of his car and walked up to the track. The court held that it was his duty to stop, look and listen at a point where such conduct would be effective, and that common prudence under such circumstances would dictate that he bring his machine to a full stop before attempting to cross the track. Further, that under the situation as revealed by him, assuming his testimony to be true, it was his duty to get out of his car and go forward a few feet in order that the danger of a collision might be placed beyond peradventure. Thompson v. Southern Pacific R. Co. (Cal.), 161 Pac. 21.

Carrier of Goods—Punitive Damages.—Under the Carmack Amendment punitive damages are not recoverable for delay to an interstate shipment, though caused by wanton and wilful acts of the employees of the carrier, unless it be shown that the company authorized or ratified such acts. DeLoach v. So. Ry. Co. (S. C.), 90 S. E., 701. Harman v. Sou. Ry. Co. (S. C.), 90 S. E. 1023.

Carrier of Goods—Delay—Flood.—In an action for damage to an interstate shipment the agreed statement of facts showed that the shipment was delayed several days by the negligence of the carriers, that it arrived at destination on Sunday, and that it could not be unloaded on Monday or Tuesday on account of a rainstorm, resulting in the destruction of the goods by a flood before they were unloaded. HELD that a verdict should be directed in favor of the carrier, since the federal decisions, which are controlling as to interstate shipments, hold that the flood and not the delay is the proximate cause of the loss. Continental Paper Bag Co. v. Maine C. R. Co. (Me.), 99 Atl. 259.

Contract for Right of Way—Passes—Foreclosure.—Where a land owner gives a railway company a right of way through his property in consideration of the railway company's giving him and his family transportation for life over its lines, this contract and all rights thereunder are rendered invalid where the railway company is later sold out under foreclosure proceedings. Perkins v. Public Service Ry. Co. et al., 99 Atl. 387.

AMENDMENT TO JUDICIAL CODE.

(Public No. 300, 64th Congress)

An Act to amend section two hundred and seventy-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two hundred and seventy-six of an Act entitled "An Act to codify, revise, and amend the laws relating to the judiciary," approved March third, nineteen hundred and eleven, be, and the same is hereby, amended so as to read as follows:

> "Sec. 276. All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed theren by the clerk of such court, or a duly qualified deputy clerk, and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk, or a duly qualified deputy clerk then acting, may belong, the clerk, or a duly qualified deputy clerk, and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein."

Approved, February 3, 1917.

Louisiana Stop, Look and Listen Rule.—The Louisiana Supreme Court holds that a traveler at a crossing who contributes to an accident from an approaching train by failing to stop, look and listen, cannot recover, though the railroad is also negligent. The action was for the death of a young lady who was struck by a pasenger train while attempting to cross three tracks in a buggy. It was held that if she had looked and listened she had ample opportunity to see and hear the train before she reached the crossing, and no recovery could be had. Foreman v. Louisiana Western R. Co., (La.) 73 So., 242.

Federal Employers' Liability Act—Interstate Commerce.—An employee injured while building a scaffold to be used by him in painting a freight shed which is used by a railroad as an instrumentality in interstate commerce, is not engaged in an act so directly and immediately connected with interstate commerce as substantially to form a part or necessary incident thereto, so his injury is, therefore, not compensable under the federal statute. Killes v. Great Northern Ry. (Wash.), 161 Pac. 69.

Carriers of Goods—Delay—Flood—Burden of Proof.—A shipment of goods was negligently delayed in transit by the carrier and as a result was caught in a flood and destroyed. HELD, That the proximate cause of the loss of the goods under the federal law was the flood, an act of God, and not the delay, and this rule is controlling as to interstate shipments notwithstanding a contrary rule in the state court. In such a case the burden is on the shipper to show negligence, other than delay, on the part of the carrier, contributing to the loss, as, for example, that it did not use due diligence to save the goods from the flood. Northwestern Consol. M. Co. v. Chicago, B. & Q. R. Co. (Minn.) 160 N. W. 1028.

Carriers of Goods—Agreed Valuation—Measure of Damages.—A shipment of 25 tons of copper was made from Houghton, Mich., to New York, N. Y., with direction that it be stored upon arrival at Buffalo, N. Y., for further shipping directions. This was in accordance with a tariff allowing such storage in transit. The bill of lading provided "value not to exceed $100.00 per net ton," and the tariff made the lower rate, on which the shipment was made, applicable to copper "value not to exceed $100.00 per ton." One ton of the copper was stolen while in the warehouse at Buffalo.

HELD, that the $100.00 limited valuation was applicable, and the measure of the recovery was the weight of copper lost at the rate of $100.00 per ton, and not the actual value of the lost portion subject to the limitation that the recovery should not exceed the released valuation of the whole lot. Western Transit Co. v. Leslie Co., decided by United States Supreme Court, January 8, 1917.

Railroads—Liability for Noise Incident to Operation.—After the construction of defendant's main line, plaintiff acquired a residence a short distance from the right of way. Thereafter, to furnish facilities to a compress Company, defendant, over its own property, constructed a spur track leading to the compress. The noise of switching annoyed plaintiff and his family but that was the only injury from the spur track. HELD that as the railway Company could have been compelled to construct the spur track to furnish facilities and that in doing so it was carrying on business for which it was organized, plaintiff could not recover damages for injuries occasioned by the noise, such injuries being damnum absque injuria. Beam v. So. Ry. Co. in Mississippi (Miss.), 73 So. 55.

Carriers of Goods—Notice of Claim—Waiver.—A stipulation in a contract for shipment of livestock that the shipper must, as a condition precedent to his right to recover for loss or damage, give notice in writing to the carrier's agent of claim for such damage before the stock are removed or mingled with other stock, cannot be waived, as to interstate shipments, by reason of the anti-discrimination provisions of the Act to Regulate Commerce. Wall v. Nor. Pac. R. Co. (Mont.), 161 Pac. 518.

Crossing Accidents—Collision Between Interurban Electric Car and Motorcycle—Obstructed View.—The view at the intersection where the collision took place was obstructed by a cemetery wall. The facts in brief were that the motorman of the electric car did not give the statutory warning near the crossing; and on the other hand the motorcyclist, although traveling slowly, did not stop at the intersection. There was evidence of railway negligence and the question here was whether the motorcyclist, plaintiff, was guilty of contributory negligence, which would bar his recovery as a matter of law. The Supreme Court of Missouri said:

> "The use of the highway at these crossings by the railway and the general public is a common one, to be enjoyed by each consistently with the rights of the other. While the railroad has generally the priority of right of way, that priority depends, not on a superior right, but solely upon the principle of equality as applied to the nature of the public service it performs and the character of the machinery and appliances necessary to its prosecution. To secure this equality by preventing so far as possible the annoyance and delay of the general public which would result from casting upon them the whole burden of protecting themselves from injury in the legitimate use of the easement, the Legislature has seen fit to define the minimum of warning to be given by the railroad of the approach of its deadly instruments of traffic. It is clear that this warning would be of little utility unless the traveler for whose benefit it is designed is permitted to profit by it. If, in every case in which the traveler upon a public highway approaches a railroad crossing and can hear no warning because no train is approaching, he must act in all respects as if there were no law requiring such notice, that law would be a dead letter as to him. Should he hear the train he must stop and let it pass. Should he not hear it he must still assume it is there, coming stealthily like a criminal to take his life. This is, of course, not the law but the statutory duty is, in every such case, an element of the situation in determining the question of negligence between the parties to an accident of this character."

The motorcyclist was, therefore, held not disentitled to recover as a matter of law; his contributory negligence was held properly submitted to the jury.

This case is cited for distinction and criticism. For distinction, because the railway, an electric interurban line, was operating on the public highway, not as steam railways operate on separate rights-of-way. The primary duty of the highway traveler, therefore — the stopping, looking, and listening—may for this reason be held less rigid than in the case of the railway intersection. The criticism which occurs is directed to the construction placed by the Missouri Supreme Court upon the purpose of the statute requiring audible warnings of the railway. It is suggested that such legislation is for the safety of public highway travelers, and not to prevent their "annoyance and delay." It would seem that men of reasonable prudence at such intersections would consider safety rather than annoyance and delay, and that the courts should rule that this primary duty is paramount. Jackson v. Southwest Missouri R. Co., (Mo.), 189 S. W. 381.—Exch.

Carriers of Goods—Authority of Station Agent—Conversion.—Where the station agent at destination of the defendant carrier induced the consignee to accept a shipment damaged on the line of a preceding carrier, by representing that if the goods were accepted and claim for damage filed, such claim would be paid, it was held that the defendant was not bound by the agent's action, since it appeared that the agent did not have express authority to promise settlement of claims, and the evidence did not show that he had implied authority.

Plaintiff, having accepted the goods, could not claim as for a conversion. Cedar Rapids Fuel Co. v. Ill. Cent. R. Co. (Ia.), 160 N. W., 353.

Carriers—Refused Order Notify Shipment—Suit by Notify Party Against Shipper and Garnishment of Carrier—Suit by Shipper Against Initial Line.—Plaintiff made a shipment of oats from Hamilton, Texas, consigned to his own order, notify B, at Montgomery, Alabama, to whom he had sold the oats. A draft was drawn on B, attached to the bill of lading and handled through the bank in the usual course. B refused to receive the oats or pay the draft, which was protested and returned to the plaintiff. The delivering line notified plaintiff of the refusal of the oats, and plaintiff telegraphed D to give indemnity bond and get the oats from the railroad company. D showed the telegram to the railroad agent and the oats were delivered to him upon his giving certified check for 10% more than the value of the oats, such delivery being made more than 48 hours after arrival of the oats and after the relation of the delivering carrier to the goods under the contract had changed from that of carrier to that of warehouseman. D then brought suit at Montgomery against plaintiff and served garnishment process on the delivering carrier and procured a judgment.

HELD, plaintiff could not recover from the initial carrier. Hamilton, etc. v. Stephenville N. & St. T. Ry. Co. (Tex. Civ. App.) 189 S. W. 774.

Carriers of Goods—Special Damages—Notice.—A cotton dealer bought 47 bales of cotton, thereby exhausting his credit, until the cotton could be shipped and realized upon. He delivered the cotton to the railroad advising the agent that "he was loaded up with cotton and unless the cotton went forward promptly he would be blocked off from doing any business." The cotton was delayed and the dealer was unable, for the lack of funds or credit, to do any business for twenty days, during which time he and his office were idle. HELD the notice was not sufficient to lay the basis for the special damages claimed on account of the resulting suspension of the dealer's business. Yazoo & M. V. R. Co. v Jacobson (Miss.), 72 So. 889.

Initial Passenger Carrier Merely Agent of Connection.—The Illinois Appellate Division holds that, it being presumed, in the absence of evidence to the contrary, that a railroad company selling a through ticket over its own and a connecting line merely acts as agent for the other line, it is not liable in damages to the purchaser for the refusal of the connecting line to honor the ticket and transport the passenger in accordance therewith.—Schoenfeld v. Lake Shore & M. S. R. Co., 197 Ill. App., 419.

Carriers—Alighting from Car—Duty to Assist.—Where a woman, about 46 years of age, in good health and burdened with only a light handbag, stepped off the platform of a car standing still at a terminal station, no duty devolved upon the carrier to assist her in alighting. Garden v. Chicago & M. Electric Ry. Co., et al. (Wis.), 159 N. W. 1066.

Crossing Accident—Negligence—Evidence of Subsequent Changes in Warnings of Crossing.—Evidence was excluded at the trial of this case that after the accident changes were made by the railway in the signals or warnings at the crossing. The Supreme Court of North Carolina said of this action:

> "The subsequent changes in signals or warnings for additional safety were properly excluded under the circumstances as proof of negligence. Precautions against the future cannot be considered as an admission of actionable negligence in the past. (Columbia & P. S. Railroad Co. v. Hawthorn, 144 U. S. 202, 12 Sup. Ct. 591, 36 L. Ed. 405.) The court said in that case: 'A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safe guards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so, and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon human conduct, and virtually holds out an inducement for continued negligence.' Morse v. Minn. & St. L. Ry. Co., 30 Minn. 465, 16 N. W. 358), The same rule appears to be well settled in England. In a case in which it was affrmed by the Court of Exchequer, Baron Bramwell said: 'People do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before. Hart v. Lancashire & Yorkshire Railway, 21 Law Times, N. S., 261, 263."

McMillan v. Atlanta & Charlotte Air Line Ry. Co., (N.C.), 90 S. E. 683.

Evidence of Interstate Employment Excluded in Suit Disclosing No Federal Color—Claim of Federal Right Not Timely Made by Such Offer of Evidence.—In 1910 Mims, a car inspector, was killed by a switching engine at a public crossing while he was attempting to cross a track to inspect cars which had just arrived. Suit was commenced by complaint disclosing no Federal color. Nor did the answer of the railroad disclose such color. There was a trial which resulted in nonsuit which was reversed by the Supreme Court of South Carolina; a second trial commenced and after plaintiff administratrix had rested her case the railroad offered evidence to prove that the train Mims was going to inspect was an interstate train and that Mims was therefore employed in interstate commerce. This evidence the trial court rejected as irrelevant to any issue tendered by the pleadings. The railroad made no application to amend its answer by adding claim under the Federal law. The State courts, trial and appellate, decided that under the State practice the evidence was not admissible for the reason given. Reviewing this result, Mr. Justice Clarke said:

> "The essential justice of this decision, which is the fundamental thing, commends it to our favor."

The opinion proceeds to point out that the facts giving interstate color to Mims's employment were known to the railroad and "could not possibly have been known to the plaintiff, and therefore surprise and delay certainly, and possibly defeat of plaintiff's claim under statutes of limitation, must have been the inevitable result of permitting the introduction of the proffered testimony late in the second trial, without the Federal right claimed from it having been 'specially set up and claimed' in the answer of the defendant." Dismissing the writ of error for want of jurisdiction, the Supreme Court held that Federal right was not claimed at the proper time and in proper manner to lay the foundation for Federal review of the State Court. Atlantic Coast Line R. Co. v. Mims, decided by the Supreme Court of the United States January 15, 1917, No. 242 of October Term, 1916 (not yet officially reported.)

Crossing Accident—Contributory Negligence.—Where the driver of a team could see an approaching train 1500 feet from the crossing and the facts show that he did not stop, look and listen before going over the crossing, he is guilty of contributory negligence barring a recovery on his death resulting from a collision on the crossing. Larabee v. Western Pac. Ry. Co. (Cal.), 161 Pac. 750.

Contributory Negligence—Excessive Speed of Train.—Where the driver of a wagon approaches a railway crossing negligently it is no defense to say that he had a right to presume that the train would not approach the crossing at an excessive rate of speed. Larabee v. Western Pac. Ry. Co. (Cal.), 161 Pac. 750.

INTERSTATE COMMERCE COMMISSION DECISIONS.

MISROUTING

Shipments were delivered to the D. L. & W. at Plymouth, Pa., consigned to Wellsboro, Pa., three without routing instructions, and one routed "N. Y. C. & H. R. R." The shipments moved over the line of the initial carrier to Corning, N. Y., and New York Central to Wellsboro. There was no joint through rate, and charges were collected at the combination of 21.5 cents. At the time lower combinations were available over the other routes, the lowest of which was 19 cents, which applied over the D. L. & W. to Pittston, Pa., Lehigh Valley and New York Central beyond, which was an intrasate route. The rate over this route, however, was on file with the Interstate Commerce Commission.

HELD: The initial carrier misrouted the three shipments which were unrouted by the shipper, but as to the shipment routed by the shipper over the New York Central, this shipment was not misrouted. Where consignor specified routing by naming a carrier which, in connection with the originating line, forms a through route from origin to destination, initial carrier cannot be charged with having misrouted the shipment if it bills over that route instead of selecting a cheaper route in which those carriers participate, but with a third carrier intervening. Stebbins v. D. L. & W. R. R. Co., et al., 42 I. C. C. R. 150.

Shipment originating at Dayton, O., destined to Kilbourne, La., a local station on the Iron Mountain. It was delivered to the Pan Handle, routed in the bill of lading "c/o St. L. I. M. & S." and moved by way of initial line and Vandalia to E. St. Louis and was there delivered to the Iron Mountain. No joint rate applied over the route of movement, and combination of 36.5 cents to E. St. Louis and 27 beyond was assessed. Kilbourne was a prepay station (no agent there), but only part of the charges were prepaid at Dayton, and the lines east of E. St. Louis retained the charges to that point and delivered the shipment to the Iron Mountain with prepaid charges of 14.5 cents. As this amount was insufficient to prepay the charges from E. St. Louis to Kilbourne, the Iron Mountain rebilled the shipment to the first agency station beyond Kilbourne and charged $15 for the local haul back to Kilbourne. In the Iron Mountain tariff Kilbourne appeared as prepay station, with the notation, "No agent. Freight must be prepaid," but there was no tariff authority for carrying shipment to the next station beyond, or for assessment of local charges back to Kilbourne because charges were not prepaid.

HELD: That if, without notifying the initial line to collect the full prepay charges, or requesting instructions, the Iron Mountain assumed the responsibility of forwarding the shipment to a station beyond the named destination, it must accept the resulting liability for increased charges, and it was not shown that the Iron Mountain notified the initial line or made any effort to collect the full charges before forwarding the shipment. Young et al. v. P. C. C. & St. L. Ry. Co., et al., 42 I. C. C. R. 183.

APPLICATION OF THROUGH RATE. ESTABLISHMENT OF DIVISIONS NOT NECESSARY.

Shipment of oranges moved as routed from Umatilla, Fla., to Cincinnati, O., and was reconsigned to St. Louis. Charges were collected at the rate of 70 cents. A joint rate of 66 cents applied over the route of movement. Defendants' reconsigning rules provided that the destination of a shipment might be changed and the through rate to the new destination charged, "provided car will move over route via which through rates and divisions are established, and further, provided the changed destination be beyond or on a through route from original shipping point to final destination." Defendants urge that divisions had not been established over the route of movement, and that the 66-cent rate therefore was inapplicable.

HELD: Whether or not divisions had been established is immaterial. Existence or non-existence of divisions is a matter solely within the knowledge of the carriers, and a tariff provision which makes the application of a certain rate dependent thereon is indefinite, ambiguous and unlawful. Markley & Co. v. A. C. L. R. R. Co., et al., 42 I. C. C. R. 187.

INITIAL CARRIER ENTITLED TO LINE HAUL.

Shipment was from Columbus, Miss., to Cairo, Ill., and there reconsigned to Cairnbrook, Pa. Columbus is served by the Southern Railway in Mississippi and Mobile & Ohio. Consignor, whose plant is on the line of the Southern, delivered the shipment to that carrier at Columbus and routed specifically M. & O. Shipment moved by Southern to West Point, Miss., and M. & O. thence to Cairo, where it was reconsigned to final destination. Route of movement was by M. & O. West Point to E. St. Louis and Pennsylvania Lines beyond. No joint through rate applied over route of movement and charges were collected at combination amounting to rate of 36 cents. There was joint rate of 32 cents contemporaneously effective by way of M. & O. from Columbus via West Point to Cairo and thence Pennsylvania Lines to destination, and complainant contends this rate should have been applied. On shipments originating on the Southern's line at Columbus and forwarded from that point by M. & O., the latter carrier absorbs the switching charges.

HELD: That had the shipper directed that cars be switched to M. & O., and had shipments been delivered to that carrier for transportation from Columbus under its own bills of lading, complainant would have been entitled to the 32-cent rate, but the shipments were delivered to the Southern, and that carrier was entitled, under the directions given, to its line haul. It was under no obligation to deliver the shipments to its competitor at point of origin. Terhune Lumber Co. v. Southern Railway Co. in Miss., 42 I. C. C. R. 217.

ROUTING OF SHIPMENTS BY CONSIGNEES.

The following Conference Ruling was approved and adopted on January 8, 1917:

Former Rulings Rescinded.—Upon consideration of the provisions of the Act of Congress entitled "An Act Relating to Bills of Lading in Interstate and Foreign Commerce," Pub. No. 239, 64th Congress, approved August 29, 1916, Conference Rulings 332, 453, and 482 are hereby rescinded.

The following are the rulings rescinded:

December 11, 1911.

332. Carriers Failing to Obey Routing Instructions Liable to Prosecution.—It is the view of the Commission that interstate carriers failing or refusing to observe specific routing instructions by the shipper are liable to prosecution under section 10, the right to determine the through line or route over which his freight shall be transported having been expressly reserved to the shipper under section 15 of the act as amended on June 18, 1910.

January 6, 1913.

453. Change of Route by Consignee.—Upon inquiry as to whether the consignee of a shipment moving under a straight bill of lading has a right to vary the original routing instructions given by the shipper, the Commission adheres to Conference Ruling 332 to the effect that the route designated by the shipper shall be observed.

July 26, 1915.

482. Routing of Shipments by Consignees.—While the Commission adheres to the views heretofore expressed in Conference Rulings 332 and 453: HELD, That, under proper tariff provision therefor, carriers may observe routing, diversion, or reconsignment instructions furnished in writing by the consignee where the consignor and the consignee are identical, or where the shipment is made by the consignor as the authorized agent for that purpose of the consignee. Billing in such cases must show that the consignee is in fact the shipper or that the consignor named therein makes the shipment as authorized agent for that purpose of the consignee.

Negligence — Proximate Cause—Violation of State Headlight Statute.—Salabrin, a section man, was injured when a handcar upon which he was riding was run down by a train the engine of which was bein operated without a headlight. A defense of the railroad was that, admitting that the headlight was not burning, the company owed Salabrin no duty in respect of the headlight. Overruling the defense, the Court said:

> "We do not think that the use of a headlight, whether prescribed by statute or demanded by practice in good railroading, should be held to be for the benefit of the public only, and not for the benefit of the employees of the railroads. Such employees are obliged constantly to be upon the right of way and in the yards of the railroad companies, and after dark the use of a headlight is to them one of highest guaranties of safety to life and limb."

Judgment for plaintiff affirmed. Salabrin v. Ann Arbor R. R. Co., (Mich.), 160 N. W. 552.

Horse Frightened in Nearby Highway—Discovered Peril.—Plaintiff and her brother were driving in a buggy on a road parallel to the railway when their horse was frightened by alleged unnecessary noises on an engine. The trial Court charged the jury that if they believed that the engineer, after discovering the plaintiff in the highway, saw, "or by the use of ordinary care could have been," that the horse was frightened, and thereafter failed to avoid unnecessary, loud noises they should find for the plaintiff. The railway attacked this instruction as imposing on the engineer the duty to discover plaintiff's peril in the nearby road. Reversing the judgment for the plaintiff, the court concluded that the engineer "was under no duty to discover plaintiff's peril, but that his sole duty was to use ordinary care, with all reasonable means at his command, to prevent injury to plaintiff after her peril was discovered." The court distinguished cases in which it had been held that the engineer was under a duty to discover a similar peril of the highway traveler, on the ground that those cases were crossing cases, or cases of electric cars on highways. "Here the railroad was on its own right of way and its tracks were from 20 to 75 feet distant from the highway in question." Louisville & N. R. Co. v. Stanaford, (Ky.), 189 S. W. 427.

Proof of Negligence and Cause of Fire by Sparks.—In an action for damages caused by fire alleged to have been set by a locomotive, the Oregon Supreme Court holds that the law does not require of a railroad care beyond that which the state of the art will admit. Modern science and ingenuity have not made it possible to manage steam locomotives so as absolutely to prevent the escape of sparks; and a railroad will not be liable for fires caused by the escape of ordinary and usual quantities of sparks while the engine is operated in the ordinary course of business by competent men. Mt. Emily Timber Co. v Oregon W. R. & N. Co. (Ore.), 161 Pac. 398.

Alighting from Moving Train—Contributory Negligence.—Deceased, a passenger, was notified by the brakeman that "This is where you fellows get off." The brakeman had promised to let him off the side of the train opposite from the station; and the brakeman opened the door and trap of the vestibuled car and went into the car to announce the stop. Decedent, with a grip in his left hand, went down the car steps as the train was moving holding the handhold with his right hand, the opposite side from the direction in which the train was moving. He fell from the train and was killed. The court said, denying recovery: "In going down on the steps of the car while the train was in motion, the deceased not only assumed the risk of the situation, but he failed to use the care of an ordinarily prudent person." Nonsuit affirmed. Murray v. Southern Pacific Co., 236 Fed. 704, C. C. A., 9th Cir.

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THE MEMORANDUM

Vol. II No. 9

LAW DEPARTMENT APRIL, 1917. SOUTHERN RAILWAY COMPANY

PASSENGERS INJURED STUMBLING OVER HAND-BAGGAGE IN AISLES OF CARS.

It is sometimes said that it is negligence per se for a carrier to permit passengers to place baggage or similar articles in the aisles or passageways of cars, or at least that if a passenger is injured by stumbling over such articles in the aisles of cars, the mere happening of the injury raises the presumption of negligence under the doctrine of res ipsa loquitur.

This is not believed to be a correct statement. On the contrary it may be stated that a carrier is under no positive duty to keep the aisles of its cars clear at all hazards so as to render it liable to a passenger for injuries received by reason of such obstructions regardless of negligence of the passenger or the freedom of the carrier from actual negligence.

A recent Alabama case is interesting in this connection, viz: Alabama Great Southern R. Co. v. Johnson, 71 So. 620.

There were but two witnesses, plaintiff and her daughter. Their testimony was without conflict, and was substantially to the effect that plaintiff and her daughter boarded appellant's train at Collinsville, 9:05, on the morning of September 7, Labor Day, bound for Irondale, a suburb of Birmingham. The conductor was upon the ground and assisted them up the steps. The car was crowded and as they proceeded down the aisle to get a seat plaintiff tripped over a dress suit case or valise and injured herself. Nothing appeared from the record to show how long the dress suit case had remained in the aisle, nor who put it there, nor did it appear whether any of the servants of defendant were in the car at or shortly before the time of the accident. The defendant offered no testimony. The case was allowed to go to the jury on the theory that a prima facie case was made out by showing an unexplained accident to a passenger.

The Supreme Court in reversing the action of the lower court, said:

> "The carrier of passengers for hire is not an insurer; his duty is relative, commensurate, it is true, with the highest degree of care, but not absolute. It must be shown that defendant or its servants were guilty of some negligence.
>
> "The record does not show negligence on the part of defendant, or any of its servants, by the mere presence of the dress suit case in the aisle, for non constat but that some other passenger may have set it there, and perchance but a moment before the accident. Had it been shown that some servant of defendant was in the car at the time, instead, on the contrary, on the outside, assisting passengers, it might properly have been left to the jury to say whether the servant was negligent in not being alert enough to discover the obstruction before plaintiff tripped over it. We do not consider that the bare fact of a dress suit case being in the aisle makes out a prima facie case; it is only where it is shown that the thing causing the injury is under the management or control of defendant or its servants and the circumstances attendant upon the accident are in and of themselves of such a character that, in the ordinary course of events, the accident would not have happened but for some negligence attributable to defendant, it can be said a prima facie case of negligence is made out. The doctrine of 'res ipsa loquitur' involves no substantive rule of law; it merely means that the attendant facts are of such probative force on the question of inferential negligence as to speak for themselves; i. e., to shift the burden of proof. Here, such was not the case, for no presumption or intendment can, in reason, be indulged where the proof is equally as consistent with the absence, as it is with the existence, of negligence, or, in other words, where it is left very doubtful from all the evidence whether defendant was in fact guilty of any negligence, none can, per se, be presumed."

The Court cited the case of Central of Georgia Ry. Co. v. Brown, 165 Ala. 495, 51 So. 565, where it was stated:

> "Not in every case of injury to a passenger does a presumption of negligence on the part of the carrier arise from the happening of the injury."

This latter case follows the case of Georgia Pacific Railway Company v. Love, 91 Ala. 432, 8 So. 714, which in effect overruled the previous case of Louisville & N. R. R. Co. v. Jones, 83 Ala. 376, 3 So. 902.

Mr. Hutchinson is his work on Carriers (3d ed.), at sec. 1412, says:

"The obligation of the carrier of passengers being to exercise the utmost care and diligence for their safety, it is frequently stated as a rule of evidence, in cases resting upon the question of his negligence, that proof of the accident and of the injury to the passenger thereby, without more, at once creates the presumption of negligence, which it becomes incumbent upon him to rebut. This, however, is hardly a correct statement of the law. The mere happening of the accident, aside from the circumstances by which it has been occasioned or attended, may, in every case, be consistent with the exercise of the highest degree of care and circumspection. Carriers of passengers cannot be held liable for the consequences of accidents against which no human care or foresight could have provided; and, if nothing be shown further than that an accident has happened to his vehicle, from which a passenger has sustained an injury, for aught that would appear, it may have happened from some cause for which the carrier could not be held responsible. It may have been occasioned by an act of God, which excuses alike the common carrier of goods and the public carrier of passengers, or by an act of a stranger, against which it was impossible for the carrier to guard. And the fact being that, for a large portion of the accidents which occur in the transportation of passengers, and from which they sustain injuries, the carrier is in no wise responsible, it cannot be legally inferred, in any instance from the mere proof of the accident, without showing how it occurred, that it was attributable to the negligence of the carrier or of his servants."

There are a number of decisions in various states which are in line with this principle of law where passengers are injured by falling over hand-baggage in the aisles of cars. Thus in the case of Stimson v. Milwaukee L. S. & W. Ry. Co., 75 Wis. 381, 44 N. W. 748, the appellate court in affirming a judgment of nonsuit, said:

"It is plain that it is the duty of the company to see that the aisles of their cars are not obstructed, either by satchels or any other thing, in such a way as to endanger the safety of passengers entering or leaving such cars. This proposition must be admitted to be true, so far as to compel the company and its employees to use due care and diligence in keeping the aisles of the cars unobstructed. The question in this case is whether, upon the evidence given on the trial, it raises a presumption that there was any want of care or diligence on the part of the company or its employees in not discovering and removing the obstruction in question. * * * The rule stated in these cases is that 'there must be reasonable evidence of negligence, but where the thing (meaning the thing causing the injury) is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' In the case at bar the thing which obstructed the passage in the car was evidently personal baggage of some passenger, and not a thing exclusively under the control or management of the employees of the company; and so the mere fact that it was in the aisle or passageway of the car at the exact time of the accident does not, of itself, raise a presumption of negligence on the part of the employees of the company. There may be a duty on the part of the employees of the company to remove the personal baggage of passengers from the passageways of the cars, but, in order to make it their duty to act, there must be evidence showing, or at least tending to show, that such employees had notice of such obstruction being in the aisle or passageway, or that it had remained there so long before the accident that, in a reasonably vigilant discharge of their duties, they could have discovered the obstruction before the accident happened, and failed to remove it. The evidence in the case shows that none of the employees of the company were in the car at the time the accident happened, and, in the absence of any proof to the contrary, we must presume that the duty of the employees required them to be at some other place while the train was at the station. All we have, therefore, is the one fact that, at the exact time of the accident, these satchels were in the aisle, and that the plaintiff fell over them and was injured. The personal baggage of passengers is not 'a thing under the management of the defendant and its servants' within the meaning of the rule stated in the cases above cited; and it therefore becomes necessary for the plaintiff to show by other proof that the company or its servants were guilty of some negligence or want of ordinary care in regard to these satchels. It seems very clear that there is no evidence tending to prove such negligence. There is no evidence showing or tending to show, how long these satchels had been in the aisle. It is just as reasonable to suppose that some passenger had placed them there after the train had stopped at New London as to suppose that they had been placed there before it stopped. The presumption would rather favor the conclusion that they were placed there after the train had stopped, and while the employees were performing their duty outside the car, for the reason that negligence is not presumed, and if they had been there before the train stopped, they would have been seen by the employees, or some of them, and removed from the aisle. Negligence cannot be predicated upon a state of facts which is as consistent with the exercise of care as it is with negligence. As said in the quotation above, 'there must be reasonable evidence of negligence on the part of the company or its employees,' and in this case there is no such reasonable evidence. The nonsuit was properly granted."

In the case of Burns v. Penna. R. R. Co., 233 Pa. 304, 82 Atl. 246, it was said:

> "Under the facts, there was no presumption of negligence. The rule is that where a passenger is injured by anything done or left undone by the carrier, or its employes, in connection with the appliances of transportation, or in the conduct and management of the business relating to the same, the burden of proof is upon the carrier to show that such injury did not result from its negligence. But to cast this burden upon the carrier, it must first be shown that the injury complained of resulted from something improper or unsafe in the conduct of the business or in the appliances of transportation. Thomas v. R. R. Co., 148 Pa. 180 (23 Atl. 989, 15 L. R. A. 416); Ginn v. R. R. Co., 220 Pa. 552 (69 Atl. 992); Sutton v. R. R. Co., 230 Pa. 523 (79 Atl. 719). The appliances of transportation referred to in these cases mean the roadbed, tracks, cars, engines, and all other machinery and equipment furnished by the railroad company and used in connection with the conduct and management of its business. A dress suit case belonging to a passenger is not such an appliance. * * * The mere fact that the personal baggage of a passenger is in the aisle of a car at the exact time of the accident does not of itself, raise a presumption of negligence on the part of the employees of the railroad company. While it. no doubt, is the duty of the employees of a railroad company to remove the personal baggage of passengers from the aisles of cars, they must, in order to make it their duty to act, have notice that such obstructions are in the aisle, or the obstruction must have remained there for so long a time before the accident that, in the exercise of due care, they would have discovered it before the accident occurred."

In Kantner v. Philadelphia, etc., R. Co. 236 Pa. St. 283, 84 Atl. 774, it appeared that the plaintiff entered one of defendant's passenger cars and while walking forward, looking for a seat, she was tripped by the hand bag of a passenger that stood in the aisle. The car was crowded and dimly lighted. She did not see the bag before her foot struck it, but saw it as she fell. The trial court entered a non-suit on the ground that it was not negligence to permit handbags to be taken into passenger cars, and that there was no evidence that the trainmen knew that the bag was in the passageway, or that it had been there for such a length of time as to charge them both with notice.

Where the only evidence that the Railway Company was guilty of negligence in allowing a valise to remain in the aisle of a car until plaintiff was injured by falling over it was that it was placed in the aisle by the owner not more than five minutes before the accident occurred and further where it was shown that during that interval of time both the conductor and brakeman of the train were not in the car at all but were on the outside directing and assisting passengers to get thereon, it was held manifest that they did not know and by the exercise of ordinary care could not have known of the obstruction of the aisle by the valise. Veiser v. Cincinnati, etc. Ry Co. 152 Ky. 522, 153 S. W. 742.

Of course if the passenger who is injured by falling over packages has knowledge of their presence on the floor as obstructions to his safe passageway, he cannot recover. Cincinnati Traction Company v. Hamburger, 32 Ohio Cir. Ct. 253, affirmed 84 Ohio St. 456, 95 N. E. 1148, where it was said:

> "It is a matter of common knowledge that passengers on street cars take with them parcels of different kinds which they commonly carry on the streets. This is evidently a reasonable and proper use of the cars and if passengers were prohibited from so using the cars it would deny to the public a right for which the cars were created. And one entering a car must be held to do so with knowledge that other passengers may have with them parcels of the character mentioned."

In Lyons v. Boston El. R. Co., 204 Mass. 227, 90 N. E. 419, the plaintiff sued to recover for injuries incurred by stumbling and falling over some bundles, as she was entering a car, and which had been left by a fellow passenger in the doorway of the car. There was no evidence as to the length of time they had been in the doorway. The court, in holding that the defendant was not liable, said:

> "The only reasonable inference from these facts is that the parcels were placed in the doorway by a passenger. Passengers upon elevated cars frequently carry bundles of all sorts, and have a right to do so. It is difficult to conceive of performing a service like that of defendant without permitting bags and parcels to be brought into the cars. Passengers have control of them, and may be expected occasionally to put them on the floor of the car. The degree of peril to other passengers resulting therefrom is ordinarily slight. Such things reasonably and intelligently done do not constitute sources of danger. Pitcher v. Old Colony St. R. Co. 196 Mass. 69."

This case was cited and followed in the later case of Jackson v. Boston Elevated Ry. Co., 217 Mass. 515, 105 N. E. 379, where the Court said:

> "The carrying of traveling bags or bundles by passengers is an ordinary incident of travel, and unless the carrier can be charged with reasonable notice that such articles are so placed as to become obstacles to the safe entrance or exit of passengers no neglect of duty is shown."

Verdict for defendant was affirmed.

See also Luddy v. Old Colony St. R. Co., 210 Mass, 293, 96 N. E. 675, and Farrier v. Colorado Spring Rapid Transit R. Co. Co., 42 Colo. 331, 95 Pac. 294, which are cases of injuries to passengers by articles taken in the cars by other passengers, which cases are in line with the principles above enunciated. H. O'B. C.

Washington, D. C., April 11, 1917.

Commerce—Railroads—Nature of Employment.—Where a railroad carpenter was killed by train as he went across the track to buy a newspaper, he was not then engaged in interstate commerce, and action for his death was not within provision of Federal Employers' Liability Act. Illinois C. R. Co. v. Archer, (Miss.), 74 So. 135.

Weight of Evidence—Negative Testimony as to Ringing of Bell on Locomotive.—In an action for damages for the death of plaintiff's husband killed at a private railroad crossing, where there was affirmative testimony that warnings were given by whistle and bell, and where plaintiff's only witness, admitting that he was busily engaged at the time, stated that he did not hear any bell, such negative testimony was insufficient to overcome that of defendant's witnesses, and judgment for defendant non obstante veredicto was proper. Kubrak v. Penn. R. Co. (Pa.), 100 Atlantic, 94.

Master and Servant—Obvious Dangers—Assumption of Risk.—The risk from a clod of clay projecting from the face of a sand bank, where it had lodged when prized from the top, was assumed by a sand shoveler, experienced in the work; it being a part of the business of the shovelers, known and recognized by them, to remove such clods whenever they thought them dangerous, of which they were the sole judges. Norfolk & W. Ry. Co. v. Tucker's Admx., (Va.). 91 S. E. 614.

Release—Breach of Oral Promise of Re-Employment.—Settlement for $6,000 was made by an engineer of a claim for the loss of one foot and serious injury to the other. The settlement was made one year after the injury, and written release was executed by the claimant. He afterward brought suit, alleging breach of an oral promise, contemporaneous with the release, for his re-employment, as a part of the condiseration. It was held that such promise, even if fraudulently made and broken, did not render the release void, but at most merely voidable in equity. Plaintiff, the court held, could not disregard the release and sue at law on his original cause of action without returning or offering to return the substantial cash condiseration paid him. Judgment for defendant was affirmed. Smith v. St. Louis & S. F. R. Co. (Miss.), 73 So. 801.

Boarding Moving Freight Train—Contributory Negligence.—Plaintiff sued for injuries received while atempting to board a freight train moving at the rate of six miles an hour and increasing speed. Plaintiff alleged that his status was that of passenger, though it appears that he was a caretaker. The court distinguished the jury cases dealing with attempts to board or leave moving passenger cars on the ground that the freight car which plaintiff was trying to board had no platform or steps but only a stirrup and grab-irons, and, assuming prior negligence on the part of defendant, held plaintiff guilty of contributory negligence as a matter of law, and denied recovery. As to negligence of defendant after plaintiff's attempt to board the moving freight train, the court said:

> "We do not think that there was any proof of negligence on the part of the defendant's servants subsequent to the negligent act of the plaintiff in attempting to board the train. The plaintiff testified that the car gave a 'snatch' when he caught the grab-iron on the car, but this may have been but an ordinary incident to the movement of the freight train, and there is no evidence whatever that the servant of the defendant who caused the car to move or 'snatch' knew that the plaintiff had hold of the grab-iron or was attempting to board the car. It is true the flagman saw him before attempting to board the car, but there is no proof that the flagman discovered him in a perilous positon in time to have averted the injury by having the person in charge of the movement of the train to slacken or stop the same before injuring the plaintiff."

Travis v. Alabama Great Southern R. Co. (Ala.), 73 So. 983.

Punitive Damages for Conduct of Special Officer—Evidence of Ratification.—Action was brought against the railway company for damages for the conduct of a special policeman in ejecting plaintiff from the station premises. The charge of the court was to the effect that if the railway company knew of an oppressive and malicious assault and had means of verifying the charge, but thereafter retained the guilty officer in its employ, punitive damages might be recovered. It was not disclosed by the evidence that the defendant railway company had had opportunity to investigate the truth of the charge of malicious or oppressive assault. In reversing a judgment for plaintiff, the Supreme Court of California said:

> "Under these circumstances the failure to discharge the special officer was not even an element of proof of an approbation, indorsement, or ratification of his acts. If a plaintiff in a case such as this wishes to charge a principal with vindictive damages, he should inform the principal of the facts before commencing the action, and should give him an opportunity of redressing the wrong. The mere notification of the principal of the claim of the injured person is not enough. There should be, in addition to this, time and opportunity for investigation."

Edmunds v. Atchison, T. & S. F. Ry. Co. (Cal.), 162 Pac. 1038.

Automobiles—Contributory Negligence—Driver's Duties a Jury Issue.—An automobile which was being slowly driven across a railroad track at grade was struck by cars being switched. The defendant contended that because the driver did not stop at the most advantageous place, and because he failed to alight from his machine and advance on foot to ascertain whether or not cars were approaching the grade crossing, his view being obstructed, and because he did not stop the noise of his engine, he was lacking in ordinary care as a matter of law. Taking note of the fact that the question of ordinary care under given circumstances is an issue of fact, the Indiana Supreme court said:

> "The Courts of this State have been very cautious in stating that any special acts or precautions were required in the exercise of ordinary care, generally leaving that question to the jury. This Court has declared as a matter of law that ordinary care requires a person about to cross a railroad track to use his senses of sight and hearing, but it has never said that he must stop or that he must look or listen at any particular place, except that he should look or listen at some place where such precautions would enable him to see or hear the approach of a train. Pittsburgh, C. C. & St. L. Ry. Co. v. Dove (1916) 111 N. E. 609, and cases there cited.
>
> "Appellant asks us to go further in this case, and to declare as a matter of law that other specific precautions on the part of appellee were necessary in the exercise of ordinary care, as, for instance, to stop his motor, or to stand up and look, or to get out and go forward and look, up and down the track. It is possible that the judge who presided at the trial may have thought that ordinary care, under the circumstances shown, required the use of some or all of such precautions, or that some of the members of this Court may think so; but these are not questions of law for the decision of Courts. It has been thought wise to submit such questions to the twelve laymen composing the jury, to be decided as questions of fact under proper instructions from the Court, in order that they may bring to bear their varied experiences and knowledge of men, in determining what a reasonably prudent man would ordinarily do under the circumstances disclosed by the evidence. This Court cannot say that there is no room for reasonable minds to differ on any of these questions, and therefore cannot, hold as a matter of law that any precaution under consideration should or should not have been observed in the exercise of due care."

The ease of control of an automobile was urged on the attention of the Court and the Court said:

> "It is entirely proper for the trial Court, in its instructions, to advise and direct the jury that in the consideration of such questions it should take into account the character of the vehicle in which the injured party was riding, and the manner and method of its control, etc.; but, when such Court in any case attempts to fix a standard or quantum of care different from that above indicated, it intrenches on the right of the trial of such question by the jury."

Judgment for plaintiff affirmed. Central Indiana Ry. Co. v. Wishard, (Ind.), 114 N. E. 970.

Crossing Accident—Contributory Negligence.—In an action for damages for injury to an automobile truck and goods as a result of a collision at a railroad crossing, it it appeared that the plaintiff could have seen the defendant's locomotive when thirty feet away, and was driving the truck at such a speed that it could have been stopped at any time within ten feet. The Illinois Appellate Court held that the plaintiff was guilty of contributory negligence. The court said that the law would not tolerate the absurdity of allowing the plaintiff to testify that he looked but did not see the train, when the view was unobstructed, and if he had properly exercised his sight he must have seen it. Cline v. Chicago, M. & S. P. R. Co., 198 Ill. App. 165.

Railroads—Necessity for Electric Switch Protection—A Question for Experts.—In an action for injuries to a passenger caused by the derailing of a train at an open switch, which the defendant, the D. L. & W., claimed was opened maliciously, the plaintiff offered proof that there is a "standard switch stand," which, as soon as the switch is touched, gives an electric automatic caution signal at a point some distance in the rear of the switch. The accident happened on the Syracuse division of the defendant's road, single track, over which there was comparatively little traffic. The Circuit Court of Appeals, Second Circuit, held that the testimony offered could only be made relevant or material if allowed by proof that such an arrangement was commonly used under similar conditions in similar country with similar traffic. No such proof was offered by the plaintiff, and the defendant called expert witnesses to the contrary. It was held error to submit to the jury the question whether it was negligence for the railroad not to use such a signal, since that issue was one for railroad experts, not one which the ordinary juror was competent to determine from his own knowledge or experience. Judgment for the plaintiff was reversed and a new trial granted. Delaware, L. & W. R. Co. v. Donahue, 238 Fed. 770.

Carriers—Opportunity to Buy Ticket.—In an action for damages for attempted ejection with force from a train after the plaintiff had tendered to the conductor the price of a ticket he had failed to procure before boarding the train, the South Carolina Supreme Court holds that evidence that the ticket office was closed at a time 35 minutes before the train actually departed (the bulletin showed the train was 20 minutes late), without evidence that it remained closed from that time until the departure of the train, is not sufficient to warrant a finding that the plaintiff had no reasonable opportunity to purchase a ticket before boarding the train, and judgment for the plaintiff was reversed and a non-suit granted.—Read v. Atlantic Coast Line R. Co. (S. C.), 91 S. E., 378.

PENALTIES FOR UNREASONABLE DELAY IN THE TRANSPORTATION OF GOODS. NORTH CAROLINA STATUTE AND DECISIONS.

Section 2632 of the Revisal of North Carolina makes it unlawful for any railroad company, steamboat or express company, doing business in North Carolina, to omit or neglect to transport within a reasonable time, any goods or merchandise received by it for shipment and billed to or from any place in the State, unless otherwise agreed upon between the company and the shipper, or unless the same be burned, stolen, or otherwise destroyed. The statute further provides that each and every company violating its provisions shall forfeit to the party aggrieved the sum of $15.00 for the first day, and $2.00 for each succeeding day, of such unlawful detention or neglect where such shipment is made in carload lots, and in case of less quantities there shall be a forfeiture in like manner of $10.00 for the first day and $1.00 for each succeeding day, provided the forfeiture shall not be collected for a period exceeding thirty days. In reckoning what is reasonable time for such transportation, the statute provides that it shall be considered that the carrier has transported the freight within reasonable time if it has done so in the ordinary time required for transporting such articles of freight between the receiving and shipping stations, and that a delay of two days at the initial point and forty-eight hours at one intermediate point for each hundred miles of distance or fraction thereof over which said freight is to be transported, shall not be charged against the carrier as unreasonable, but shall be deemed prima facie reasonable, and a failure to transport within such time shall be held prima facie unreasonable.

The constitutionality of this, and other similar statutes, regulating the business of common carriers and imposing penalties for violation of the statute, or failure to perform the duties imposed upon them by it, has been so often decided that it is no longer an open question.

Stone v. Atlantic C. L. R. Co., 144 N. C. 220; 56 S. E. 932;

Morris v. Southern Express Company, 146 N. C. 167; 59 S. E. 667;

Efland v. Southern Rwy. Co., 146 N. C. 135; 59 S. E. 355;

Davis v. Southern Rwy. Co., 147 N. C. 68; 60 S. E. 722.

In the construction of this statute, it has been held that reasonable time for the transportation of goods in any given case is to be determined by ascertaining the ordinary time required for such transportation, after making the proper deduction for the length of time of delay permitted by the statute at the initial and at each intermediate point. For all of the time in excess of this ordinary time the carrier is liable for the statutory penalty for each day's unreasonable delay, after deducting two days at the initial point and forty-eight hours at each intermediate point.

In other words, the carrier is entitled to the ordinary or reasonable time required for the transportation of the goods, and in addition thereto two days at the initial point, and forty-eight hours at each intermediate point before any penalty can be imposed for delay.

Stone v. Atlantic C. L. R., supra;

Jenkins v. Southern R. Co., 146 N. C. 178; 59 S. E. 663;

Hamrick v. Southern R. Co., 146 N. C. 185; 59 S. E. 666;

Davis v. Southern R. Co., 147 N. C. 68; 60 S. E. 722.

In the construction of this statute, it has been held that an "intermediate point," at which a delay of forty-eight hours is permitted, is a point of junction with another road, or branch line, where a transfer of the goods, or of the car containing the goods, is necessary.

Davis v. Atlantic C. L. R. Co., 145 N. C. 207; 59 S. E. 53;

Wall v. Southern R. Co., 147 N. C. 407; 61 S. E. 277;

Col. Agency v. Southern R. Co., 147 N. C. 593; 61 S. E. 462;

Mfg. Co. v. Southern R. Co., 152 N. C. 665; 68 S. E. 243.

If the carrier has transported the goods from the initial point to the point of destination within a reasonable time it is not liable to a penalty for unreasonable delay in their transportation under the statute merely because, by reason of the neglect or default of the carrier or its agent at the point of destination, there has been a failure to deliver the goods to the consignee when called for.

Alexander v. Atlantic C. L. R. Co., 144 N. C. 93; 56 S. E. 697.

It has been held, however, that the transportation of the goods has not ended until the carrier has unloaded the goods and placed them in its warehouse, or has placed the car on its team tracks for the purpose of being unloaded by the consignee; the mere arrival of the car on the yards of the carrier at a point where it cannot be reached and unloaded not being sufficient to terminate the transportation.

Wall v. Southern R. Co., 147 N. C. 407; 61 S. E. 277;

Mfg. Co. v Southern R. Co., 152 N. C. 665; 68 S. E. 243.

It has also been held that the statute applies only to intrastate shipments and that, although both the initial point and the point of destination are within the borders of the State, yet if any part of the transportation is without the State, the statute does not apply.

Hickory Marble & Granite Co. v. Southern R. Co., 147 N. C. 53; 60 S. E. 719;

Shelby Ice & Fuel Co. v. Southern R. Co., 147 N. C. 61; 60 S. E. 723;

Shelby Ice & Fuel Co. v. Southern R. Co., 147 N. C. 66; 60 S. E. 721;

Hanley v. Kansas City S. R. Co., 187 U. S. 617.

In the construction of this statute the principal question which has troubled the courts and counsel has been the determination of who is the party "aggrieved," and consequently who may bring the action for the penalty given by the statute for unreasonable delay in the transportation of the goods.

The general rule undoubtedly is that delivery of goods by a vendor to a common carrier for transportation and delivery to his vendee is, prima

facie, delivery to the consignee, and the title passes at once to vendee.

Hunter v. Randolph, 128 N. C. 91; 38 S. E. 288;
Ober v. Smith, 78 N. C. 313.

In such case the consignee is prima facie the owner of the goods in transit, the property therein vesting in the consignee upon delivery to the carrier, the latter being the agent of the consignee, who alone can sue the carrier for non-delivery.

Stone v. Atlantic C. L. R. Co., 144 N. C. 220; 56 S. E. 932.

Therefore, in the construction of this statute, it has been held that where goods have been shipped on an open bill of lading, nothing else appearing, the consignee is the owner of the goods, and he alone has the right to call upon the carrier to perform its contract and transport and deliver the goods; and that therefore the consignee is the sole party aggrieved within the meaning of the statute where there has been an unlawful delay in the transportation of the goods and that he alone can maintain the action for the penalty for unreasonable delay in the transportation of the goods. This rule is not changed by evidence that the goods were not to be paid for until they are actually received by the consignee.

Stone v. Atlantic C. L. R. Co., 144 N. C. 220; 56 S. E. 932;

Mfg. Co. v. Southern R. Co., 149 N. C. 261; 62 S. E. 1091;

Gaskins v. Southern R. Co., 151 N. C. 18; 65 S. E. 518;

Grocery Co. v. Southern R. Co., 170 N. C. 241; 87 S. E. 57;

Buggy Corporation v. Atlantic C. L. R. Co., 152 N. C. 119; 67 S. E. 251;

Cardwell v. Southern R. Co., 146 N. C. 218; 59 S. E. 673.

In the case of Grocery Co. v. Southern R. Co., supra, the Grocery Company of Hamlet, N. C., ordered of the Reynolds Tobacco Company of Winston, N. C., certain boxes of tobacco which were to be shipped from that point to one of its customers, the Farmers' Furnishing Company at Raeford, N. C. This having been done and two of the boxes of tobacco having been lost in transit, the Farmers' Furnishing Company, the consignee, charged the value of the lost tobacco to the Grocery Company from whom it had purchased the same, and transferred and released its claim for the loss to the Grocery Company, which brought suit for the value of the tobacco and for a penalty for failure of the carrier to pay the claim within the time limited by the statute. The Court held that the Grocery Company was not the party aggrieved but that the consignee was the party aggrieved.

While this case does not involve the liability of the carrier for a penalty for unreasonable delay in the transportation of goods, it does throw light upon the question of who is the party aggrieved within the meaning of the statute, and who therefore may sue for the penalty.

Notwithstanding the rule that when goods are shipped on an open bill of lading it is presumed that the consignee is the owner thereof and therefore the party aggrieved who is entitled to sue for the penalty for unreasonable delay in the transportation of the goods, yet this presumption may be rebutted by parol evidence showing that the consignee is not the real owner of the goods, but that the consignor is the owner of the goods and therefore the party aggrieved.

In the case of Elliott v. Southern R. Co., 155 N. C. 235, 71 S. E. 339, a carload of tannic acid wood was shipped by the plaintiff from Glenwood to the United States Leather Company at Old Fort, N. C., under an open bill of lading, but under a contract entered into between the consignor and consignee that the wood was not to be paid for by the consignee until it had been "received, inspected, and weighed" by the latter at Old Fort. There was unreasonable delay in the transportation of the car and the court held that title had not passed to the consignee, and that therefore the plaintiff, the consignor, was the party aggrieved and entitled to recover the penalty; and that it was immaterial that the carrier had no notice of the agreement that the wood was to be "received, inspected and weighed" before being paid for.

The same rule applies, and the consignor is the party aggrieved, though the shipment is on an open bill of lading, where the goods are shipped upon consignment to be sold for the benefit of the consignor, or when the contract between the parties provides for an actual delivery to the purchaser at the point of destination.

Rollins v. Seaboard A. L. R. Co., 146 N. C. 153; 59 S. E. 671;

Robertson v. Atlantic C. L. R. Co., 148 N. C. 323; 62 S. E. 413;

Cardwell v. Southern R. Co., 146 N. C. 218; 59 S. E. 673;

Summers v. Southern R. Co., 138 N. C. 295; 50 S. E. 714;

Davis v. Southern R. Co., 147 N. C. 68; 60 S. E. 722.

The general principle which seems to be established by these decisions is that the owner of the goods is the party aggrieved by an unreasonable delay in their transportation, and that the owner alone is the party who can maintain an action for the penalty. Of course if the bill of lading is not an open bill of lading, but shows affirmatively that the title to the goods does not pass to the consignee but is retained by the consignor, until the goods are paid for, or until some other act is performed by the consignee, in such case the consignor would be the party aggrieved within the meaning of the statute.

Mfg. Co. v. Southern R. Co., 149 N. C. 261; 62 S. E. 1091;

Grocery Co. v Southern R. Co., 136 N. C. 396; 48 S. E. 801;

Stone v. Atlantic C. L. R. Co., 144 N. C. 220; 56 S. E. 932;

Norfolk Southern R. Co. v. Barnes, 104 N. C. 25; 10 S. E. 83;

Killingsworth v. Norfolk Southern R. Co., 170 N. C. 47; 86 S. E. 804;

Myers v. Norfolk Southern R. Co., 171 N. C. 190; 88 S. E. 149.

And it has been decided that where the consignee of a shipment of goods under an open bill of lading is not the owner of the goods shipped, but is the undisclosed agent of the owner and receives the goods for him, the owner is the party aggrieved and entitled to maintain the suit.

Horton v. Southern R. Co., 170 N. C. 383; 86 S. E. 1020.

Notwithstanding the fact that the Act renders only unreasonable delay unlawful and the further fact that it imposes a separate penalty only for each day's "unlawful detention or neglect," the Supreme Court of North Carolina, in three early decisions under the statute, made apparently without any great degree of consideration, held the carrier liable for penalties for failure to transport the goods on intervening Sundays, though other statutes then in force forbid railroad companies either to load, unload or move any freight or freight cars on Sunday, or to operate any engine, car or train on Sunday for the purpose of transporting any freight, and render all such acts criminal and the carriers liable to a fine of not less than $500.00 for each violation.

Davis v. Atlantic C. L. R. Co., 145 N. C. 207; 59 S. E. 53;

Watson v. Atlantic C. L. R. Co., 145 N. C. 236; 59 S. E. 55;

Wall v. Southern R. Co., 147 N. C. 407; 61 S. E. 277.

It is clear that these decisions are erroneous, and it is thought that they cannot be approved when the question again comes before the court, for unless obedience by common carriers to statutes forbidding them to transport goods on Sunday is unreasonable and the delay in the transportation of the goods, due to such obedience, is unlawfld, the delay in their transportation on this day, or the neglect to transport them on this day, cannot be an "unlawful detention or neglect." It is therefore too clear for discussion that Sunday must be eliminated from the count of time in ascertaining the "ordinary time required for the transportation" between any given points, and also from the count of time in ascertaining the number of days for which penalties may be imposed for "each day's unlawful detention or neglect."

If this be not so, then it is quite clear that carriers by rail in North Carolina are driven to choose between being indicted and fined for transporting goods on Sunday or paying a penalty for not transporting, and that in escaping a fine under one statute they pay a penalty under the other.

In the later case of Collection Agency v. Southern R. Co., 147 N. C. 593, 61 S. E. 462, where these views were presented to the court, and it was urged to overrule the three cases above referred to, the court struck out the Sunday penalty imposed by the lower court, and cited a decision of the Supreme Court of South Carolina to the effect that no penalty could be imposed for delay on Sunday, but did not overrule these cases.

Under the statute of limitations, subsection 2 of section 397 of the Revisal of 1905, all actions for the recovery of penalties are barred after the lapse of one year, unless the statute imposing the penalty prescribes a different limitation.

All actions and causes of action, for the recovery of penalties abate upon the death of the party aggrieved or of the party liable.

Wallace v. McPherson, 139 N. C. 297.

S. J. ERVIN.

Morganton, N. C., April 10, 1917.

Carriers—Loss of Oil from Tank Car.—A carrier is not liable for loss of oil from a tank car loaded by shipper caused by the shipper's failure to properly close a valve, where there was no negligence on the part of the carrier contributing to the loss. Atlantic C. L. R. Co. v. Enterprise Cotton Oil Co. (Ala.), 94 So. 232.

Carriers—Notice to Consignee—Refused Shipment—Conversion.—A carrier to comply with its duty of notifying the consignee of the arrival of freight is not bound to look for him at any place other than the destination of the shipment. If the consignee refuses the shipment, the carrier may move it to another city for storage without being guilty of conversion.

The measure of damages for conversion of a refused shipment is the value of the shipment at destination less the transportation charges. Tex. & N. O. R. Co. v. Patterson (Tex. Civ. App.), 192 S. W. 585.

Refused Shipment—Liability of Consignor for Freight, Demurrage, etc.—Where the carrier tenders a shipment to the consignee in accordance with the contract of carriage, and the consignee refuses to receive it, and the carrier thereupon within a reasonable time notifies the consignor of the consignee's refusal, and the consignor fails to furnish disposition, the carrier may sell the goods according to law, and hold the consignor liable for the freight and demurrage charges and the expense of sale. It is immaterial that the consignee was the owner of the shipment and the bill of lading contained a notation "freight collect." Miller v. Atchison, T. & S. F. Ry. Co. (Tex. Civ. App.), 192 S. W. 354.

Measure of Damages for Damage to Shipment.—In an action for damage to a shipment, where the evidence was that the shipment had no market value on arrival on account of the damage, the measure of damages is the market value at destination if the goods had not been damaged less the transportation charges. Houston E. & W. T. Ry. Co. v. Brackin (Tex. Civ. App.), 191 S. W. 804.

Notice of Claim—Waiver.—A provision in a bill of lading for an interstate shipment requiring notice of claim for loss or damage to be given within a stipulated time cannot be waived. Chicago, R. I. & P. Ry. Co. v. Parsons (Okla.), 162 Pac. 954.

Liability of Consignor for Freight on Refused Shipment—Special Arrangement.—The consignor is liable for freight charges on a shipment refused by the consignee and the consignor cannot plead as a defense or a set-off, the violation by the carrier of a special agreement by virtue of which the carrier had agreed to notify the consignor promptly of the consignee's refusal, failure to give such notice having resulted in the goods (nursery trees) having become worthless, since such special agreement is unlawful under the anti-discrimination clauses of the Act to Regulate Commerce. Atchison, T. & S. F. Ry. Co. v. Stannard (Kan.), 162 Pac. 1176.

The Adamson Act Decision. — In upholding the constitutionality of the so-called "eight hour" law, the Supreme Court of the United States narrates in detail the circumstances leading up to the passage of the Act, and after setting out the Act in full, discusses two main questions: first, whether Congress has constitutional power to deal with the subjects embraced by the statute, and second, whether there has been such abuse of the power, if possessed, as to render its exercise unconstitutional. In disposing of the first question, the court says:

> "What was the extent of the power therefore of Congress to regulate considering the scope of regulation which government had the right to exert with reference to interstate commerce carriers when it came to exercise its legislative authority to regulate commerce? is the matter to be decided. That the business of common carriers by rail is in a sense a public business because of the interest of society in the continued operation and rightful conduct of such business and that the public interest begets a public right of regulation to the full extent necessary to secure and protect it, is settled by so many decisions, State and Federal, and is illustrated by such a continuous exertion of State and Federal legislative power as to leave no room for question on the subject. It is also equally true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority. But taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view, that is, the dispute between the employers and employees as to a standard of wages, their failure to agree, the resulting absence of such standard, the entire interruption of interstate commerce which was threatened, and the infinite injury to the public interest which was imminent, it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a standard of wages to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted. This must be unless it can be said that the right to so regulate as to save and protect the public interest did not apply to a case where the destruction of the public right was imminent as the result of a dispute between the parties and their consequent failure to establish by private agreement the standard of wages which was essential; in other words that the existence of the public right and the public power to preserve it was wholly under the control of the private right to establish a standard by agreement. Nor is it an answer to this view to suggest that the situation was one of emergency and that emergency cannot be made the source of power. Ex parte Milligan, 4 Wall. 2. The proposition begs the question since although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed. If acts which, if done, would interrupt, if not destroy, interstate commerce may be by anticipation legislatively prevented, by the same token the power to regulate may be exercised to guard against the cessation of interstate commerce threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce.
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> "But passing this, let us come to briefly recapitulate some of the more important of the regulations which have been enacted in the past in order to show how necessarily the exertion of the power to enact them manifests the existence of the legislative authority to ordain the regulation now before us, and how completely the whole system of regulations adopted in the past would be frustrated or rendered unavailing if the power to regulate under the conditions stated which was exerted by the Act before us was not possessed. That regulation gives the authority to fix for interstate carriage a reasonable rate subject to the limitation that rights of private property may not be destroyed by establishing them on a confiscatory basis, is settled by long practice and decisions. That the power to regulate also extends to many phases of the business of carriage and embraces the right to control the contract power of the carrier in so far as the public interest requires such limitation, has also been manifested by repeated acts of legislation as to bills of lading, tariffs and many other things too numerous to mention. Equally certain is it that the power has been exercised so as to deal not only with the carrier, but with its servants and to regulate the relation of such servants not only with their employers, but between themselves. Illustrations of the latter are afforded by the Hours of Service Act, the Safety Appliance Act and the Employers' Liability Act. Clear also is it that an obligation rests upon a carrier to carry on its business and that conditions of cost or other obstacles afford no excuse and exempt from no responsibility which arises from a failure to do so and also that government possesses the full regulatory power to compel performance of such duty.
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> "In the presence of this vast body of acknowledged powers there would seem to be no ground for disputing the power which was exercised in the Act which is before us so as to prescribe by law for the absence of a standard of wages caused by the failure to exercise the private right as a result of the dispute between the parties, that is,

to exert the legislative will for the purpose of settling the dispute and bind both parties to the duty of acceptance and compliance to the end that no individual dispute or difference might bring ruin to the vast interests concerned in the movement of interstate commerce, for the express purpose of protecting and preserving which the plenary legislative authority granted to Congress was reposed. This result is further demonstrated, as we have suggested, by considering how completely the purpose intended to be accomplished by the regulations which have been adopted in the past would be rendered unavailing or their enactment inexplicable if the power was not possessed to meet a situation like the one with which the statute dealt. What would be the value of the right to a reasonable rate if all movement in interstate commerce could be stopped as a result of a mere dispute between the parties or their failure to exert a primary private right concerning a matter of interstate commerce? Again, what purpose would be subserved by all the regulations established to secure the enjoyment by the public of an efficient and reasonable service, if there was no power in government to prevent all service from being destroyed? Further yet what benefits would flow to society by recognizing the right, because of the public interest, to regulate the relation of employer and employee and of the employees among themselves and to give to the latter peculiar and special rights safeguarding their persons, protecting them in case of accident and giving efficient remedies for that purpose, if there was no power to remedy a situation created by a dispute between employers and employees, as to rate of wages, which if not remedied, would leave the public helpless, the whole people ruined and all the homes of the land submitted to a danger of the most serious character? And finally, to what derision would it not reduce the proposition that government had power to enforce the duty of operation if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling the interregnum created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and employees by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties?

"We are of opinion that the reasons stated conclusively establish that from the point of view of inherent power the Act which is before us was clearly within the legislative power of Congress to adopt, and that in substance and effect it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative standard of wages operative and binding as a matter of law upon the parties,—a power none the less efficaciously exerted because exercised by direct legislative act instead of by the enactment of other and appropriate means providing for the bringing about of such results. If it be conceded that the power to enact the statute was in effect the exercise of the right to fix wages where by reason of the dispute there had been a failure to fix by agreement, it would simply serve to show the nature and character of the regulation essential to protect the public right and safeguard the movement of interstate commerce, not involving any denial of the authority to adopt it."

The contention of the railroads that, conceding the legislative power under the circumstance to fix a standard of wages, such authority necessarily contemplates consideration before action and not a total and obvious disregard of every right of the employer and his property—a want of consideration and a disregard which, it was urged, appear on the face of the statute and which cause it therefore to amount to a decision without a hearing and to a mere arbitrary bestowal of millions by way of wages upon employees,—is disposed of as being without merit.

The following language used by the Court is interesting in connection with the "strike" question:

> "Whatever would be the right of an employee engaged in a private business to demand such wages as he desires, to leave the employment if he does not get them and by concert of action to agree with others to leave upon the same condition, such rights are necessarily subject to limitation when employment is accepted in a business charged with a public interest and as to which the power to regulate commerce possessed by Congress applied and the resulting right to fix in case of disagreement and dispute a standard of wages as we have seen necessarily obtained."

Wilson v. New, No. 797, October Term, 1916, decided March 19, 1917.

Injury to Servant—Negligence—Sufficiency of Evidence.—Evidence that defendant railroad's hostler, under a supervisor's direction, coupled a live engine to a tender of a dead engine on which plaintiff claimed to be working, and moved it a few inches, injuring plaintiff, held not to show negligence in moving the engine. Louisville & N. R. Co. v. Gray (Ala.), 74 So. 228.

Carriers—Passengers—Carrying to Destination.—A regulation established by a railway company, providing that certain trains shall not stop at certain stations, there being enough trains to serve the purpose of local travel, is reasonable, and a passenger having actual notice that a train will not stop at the station called for by his ticket cannot recover damages for being carried beyond such station. Meeder v. Seaboard Air Line R. Co. (N.C.), 91 S. E. 527.

INTERSTATE COMMERCE COMMISSION'S CONFERENCE RULINGS.

The latest publication of Conference Rulings by the Interstate Commerce Commission is Supplement No. 2, dated July 26, 1915, to Conference Rulings Bulletin No. 6. All of the Rulings adopted by the Commission since that date, up to April 1, 1917, are set out below.

January 11, 1916.

Conference Ruling 481 is amended to read as follows:

Error in Issuance of Passenger Tickets.—The agent of an initial carrier issues half-fare or lower-class tickets and properly punches contract portion and some of the coupons, but fails to punch the other coupons; HELD, While adhering to the principle expressed in Conference Ruling 277 that initial carriers must bear the full burden of the mistakes of their agents and settle with other lines on the basis of class of tickets honored, provided that in cases of this kind where the conductors or ticket collectors of the carriers honoring the unmarked or unpunched coupons indicate thereon that the contract portion of the ticket was properly marked or punched, and that half-fare or lower-class transportation was furnished, such carriers may accept their proportions of the fares applicable to the transportation furnished; otherwise the initial carriers must settle with other carriers on the basis of fares applicable to class of transportation indicated on the coupon lifted.

February 23, 1916.

The following Conference Ruling was approved and adopted:

Interest upon Overcharge Claims.—Upon further consideration of Conference Ruling 464. It is HELD, That interest on an overcharge accrues from the date of its collection by the carrier, whether arising from an error in rate, weight, or classification.

March 28, 1916.

The Commission approved and adopted the following Conference Ruling:

(Contracts with Telegraph Company for Transportation of Property for Use Along Carrier's Lines.)—Upon inquiry as to whether or not under the provision of Section 1, "That nothing in this Act shall be construed to prevent telephone, telegraph and cable companies from entering into contracts with common carriers, for the exchange of services," a railroad may contract with a telegraph company (including in that term "telephone, telegraph and cable companies") to transport the property of such telegraph company, whether for use on the line of said railroad or merely to be transported over such line for use elsewhere, at a different rate from that applicable to such transportation under Section 6 of the Act, HELD, That while said carriers may contract for an exchange of services, such services must be exchanged upon the basis of the lawful rates of said railroad, as published and filed in accordance with the provisions of section 6 of the Act, and of the reasonable charges of said telegraph company, regularly charged other customers for similar services; except that said carriers may contract, without reference to said lawful rates and charges, for the transportation by said railroad for said telegraph company of the property of the latter over the line of the former when such property is to be used along the line of said railroad and in the construction, improvement, or operation of said railroad, that is to say, when such transportation is not conducted by said railroad as a common carrier.

January 8, 1917.

The following Conference Ruling was approved and adopted on January 8, 1917:

Former Rulings Rescinded.—Upon consideration of the provisions of the Act of Congress entitled "An Act Relating to Bills of Lading in Interstate and Foreign Commerce," Pub. No. 239, 64th Congress, approved August 29, 1916, Conference Rulings 332, 453, and 482 are hereby rescinded.

March 12, 1917.

The Commission in conference on March 12, 1917, adopted the following Conference Ruling:

Where a shipper petitions the Commission to require a carrier to establish rates dependent upon the declared value or the agreed value of the property transported, a hearing will be had and an order will issue based thereon.

Where a carrier petitions the Commission to be authorized to establish rates dependent upon the declared value or the agreed value of the property transported, the Commission will investigate the reasonableness and propriety of the proposed rates in such manner and by such means as it shall deem proper, and where the Commission finds no cause for refusing to permit the carrier to establish such rates, an order will be entered granting the desired authority conditioned on due filing thereafter with the Commission of any tariff schedules pursuant to such order. Any rate so authorized by order of the Commission upon the petition of a carrier will be subject to suspension on protest and to attack on complaint in the same manner as any other rate carried in a tariff duly filed with the Commission.

March 12, 1917.

The Commission in conference on March 12, 1917, voted to amend the fourth paragraph of Conference Ruling 354 to read as follows:

That it is not lawful for a carrier subject to this act to issue through bills of lading under an arrangement with a water or other carrier for a continuous carriage until rates applicable to such carriage or shipment, under schedule lawfully filed with this Commission by such water or other carrier, shall have become effective.

Railroads—Injuries Caused by Mail Sack Thrown From Moving Train.—A railroad company is not liable for the negligence of a postal clerk in throwing mail sacks from a moving train, but may become liable where it knowingly permits such practice where it may endanger persons lawfully at the place of delivery, without doing what it can to prevent the continuance of the negligent practice. Ergenbright v. St. Louis, I. M. & S. Ry. Co. (Kan.), 163 Pac. 173.

"Minimum Wage" Law of Oregon—Constitutionality.—Plaintiff in error was indicted and convicted for violating the following statute of the State of Oregon:

> "No person shall be employed in any mill, factory or manufacturing establishment in this State more than ten hours in any one day, except watchmen and employes when engaged in making necessary repairs, or in cases of emergency, where life or property is in imminent danger; provided, however, employes may work overtime not to exceed three hours in any one day, conditioned that payment be made for such overtime at the rate of time and one-half of the regular wage."

At the trial the indictment was demurred to as insufficient because the law upon which it was based was in violation of the Fourteenth Amendment of the Constitution of the United States and the Constitution of Oregon, which raised the question whether the act was a proper exercise of the police power of the State. It was contended that the statute was a wage law, not a health regulation, and took and property of the plaintiff in error without due process of law. In disposing of this contention adversely to the plaintiff in error, the Supreme Court of the United States, through Mr. Justice McKenna, said:

> "There is a certain verbal plausibility in the contention that it was intended to permit 13 hours' work if there be 15½ hours' pay, but the plausibility disappears upon reflection. The provision for overtime is permissive, in the same sense that any penalty may be said to be permissive. Its purpose is to deter by its burden and its adequacy for this was a matter of legislative judgment under the particular circumstances. It may not achieve its end, but its insufficiency cannot change its character from penalty to permission. Besides, it is to be borne in mind that the legislature was dealing with a matter in which many elements were to be considered. It might not have been possible, it might not have been wise, to make a rigid prohibition. We can easily realize that the legislature deemed it sufficient for its policy to give to the law an adaptation to occasions different from special cases of emergency for which it provided, occasions not of such imperative necessity, and yet which should have some accommodation—abuses prevented by the requirement of higher wages. Or even a broader contention might be made that the legislature considered it a proper policy to meet the conditions long existent by a tentative restraint of conduct rather than by an absolute restraint, and achieve its purposes through the interest of those affected rather than by the positive fiat of the law."

In considering the conditions that brought about the law or the reasons for its enactment, the court said:

> "But we need not cast about for reasons for the legislative judgment. We are not required to be sure of the precise reasons for its exercise or be convinced of the wisdom of its exercise. Rast v. Van Deman & Lewis, 240 U. S. 342, 365. It is enough for our decision if the legislation under review was passed in the exercise of an admitted power of government; and that it is not as complete as it might be, not as rigid in its prohibitions as it might be, gives perhaps evasion too much play, is lighter in its penalties than it might be, is no impeachment of its legality. This may be a blemish, giving opportunity for criticism and difference in characterization, but the constitutional validity of legislation cannot be determined by the degree of exactness of its provisions or remedies. New policies are usually tentative in their beginnings, advance in firmness as they advance in acceptance. They do not at a particular moment of time spring full-perfect in extent or means from the legislative brain. Time may be necessary to fashion them to precedent customs and conditions and as they justify themselves or otherwise they pass from militancy to triumph or from question to repeal."

The judgment of the court was that the law was not unconstitutional. Franklin O. Bunting, plaintiff in error, v. The State of Oregon, No. 38, October Term (Supreme Court of the United States), rendered April 9, 1917.

Railroads—Injury at Crossing—Contributory Negligence in Failing to See Headlight.—Deceased was killed by defendant's engine as he was walking over a crossing with which he was familiar. The whistle cord on the engine was broken, and the whistle was not sounded for the crossing, but the bell was rung continuously, and the headlight could be seen for half a mile before the crossing was reached. The court held that he was chargeable with contributory negligence in failing to look before going upon the crossing. Boston & Maine R. R. Co. v. Titcomb, 236 Fed. 129.

Status of Drovers as Passengers.—A uniform livestock contract read that the carriage of the attendant was to be without charge, other than the sum paid for the transportation of the animals, and an accompanying release stated that the attendant assumed all risk of injury. In an action by an attendant for personal injuries, the Circuit Court of Appeals, Sixth Circuit, holds that he was a passenger for hire, payable in money, not a mere gratuitous passenger, so that the limitation of ability was invalid. Although in such a case the federal courts are not bound by state decisions, the court cited, along with federal decisions, cases from the following states holding that, under similar contracts, the attendant of livestock is a passenger for hire: Ohio, Illinois, Pennsylvania, Michigan, Indiana, Kentucky, Maine, Virginia. It is the settled law of New York, however, that a person riding on a drover's pass is a gratuitous passenger (Willcox v. Erie, 162 App. Div., 94, 147 N. Y. Supp. 360, and cases therein cited). Tripp v. Michigan Central R. Co. 238 Fed. 449.

Ticket Agents' Authority to Arrest Offenders.—In an action against a railroad company for false arrest and malicious prosecution it appeared that the plaintiff, with a friend, went to the defendant's ticket office in Oklahoma City and bought tickets, giving as part payment a $20 bill. They then went to their hotel, and while dining there two policeman appeared at the hotel with one of the ticket agents. The agent went into the dining room and accused the plaintiff of passing a counterfeit $20 bill. The plaintiff protested that he did not know the bill was counterfeit, and gave another in its place. The agent then left, and soon after the police arrested the plaintiff for passsing counterfeit money. He was afterwards released, on its being found that the bill, though somewhat unusual in appearance, was genuine. The Missouri Supreme Court holds that the railroad was not liable, the transaction between the railroad and the plaintiff having terminated before the arrest. A ticket agent, not appointed to detect and arrest offenders, has no such authority, except that implied from his duty to receive good money for tickets sold; and when this is accomplished, such authority ends. Sacks v. St. Louis & S. F. R. Co. (Mo.), 192 S. W. 418.

Corporation Taxes and Lessor Corporations.—The Circuit Court of Appeals, Fifth Circuit, holds that a railroad corporation which had leased all its property to another, which operated and maintained it, paying a fixed rental to the lessor, is not carrying on or doing business, within section 38 of the corporation tax act of 1909 imposing an excise tax on corporations carrying on or doing business during the preceding year, though the corporation maintained its corporate existence, and has an office where it receives the rental and distributes it among its stockholders, and though, as required by the lease, it has during the year made certain improvements on the property, paid for by the sale of old material or by certificates of indebtedness of the lessee. The expression "doing business" in that statute is one in common use, which has the same meaning applied to a corporation as to a natural person, and does not include one who has retired from business and is merely maintaining property leased by him to another. The question arose in four consolidated suits by four railroads which had leased their properties to the Gulf, Colorado & Santa Fe, to recover taxes paid under protest. Judgment was directed to be entered for each plaintiff.—Jasper & Eastern v. Walker, 238 Fed. 533.

Shipper's Liability for Freight Charges.—A shipper who induces a railroad to transport freight in interstate commerce is liable for the lawful freight charges thereon. The Kansas Supreme Court holds that it is unavailing as a defense to an action for the charges on an interstate shipment that the shipper had long had a special understanding whereby the company was to be the agent of the consignee as to all shipments and that he guaranteed the freight charges only on condition that he should be promptly notified by the carrier if any consignee refused to accept a shipment. All special arrangements, agreements, customs, etc., are void.—Atchison, Topeka & Santa Fe R. Co. v. Stannard & Co. (Kan.), 162 Pac. 1176.

Time for Presentation of Claim—Waiver.—Bills of lading provided that claims for loss must be presented in writing within four months, etc. The shippers did not take up the matter at all with the railroad until more than four months after a wrongful delivery. In an action for the value of the shipment, the Kansas City Court of Appeals holds that the defense of failure to comply with the notice provision in the shipping contract was complete, and the railroad could not waive it by its conduct in accepting and investigating the claim and rejecting it on different grounds.—Harelson v. St. Louis & San Francisco R. Co. (Mo.), 191 S. W. 1068.

Automatic Couplers on Interstate Interurban Railways.—The Circuit Court of Appeals, Second Circuit, holds that the provision of the safety appliance act requiring automatic couplers excepting on street railways, applies to the hauling of an ordinary freight car by an electric locomotive on an interstate interurban railway. It holds that it is not necessary that trolley cars used on an electric railway between two cities in different states be equipped with automatic couplers, where they are run singly; but they must be so equipped if they are run coupled together, though each runs by the power of its own motor.—International Ry. Co. v. United States, 238 Fed. 318.

"Approach to Bridge."—The Minnesota Supreme Court holds that a public street, leading to a bridge on a 4 per cent grade, filled to its full width and at a height above abutting property, which permits the use of such property for ordinary business purposes at street level, susceptible of all the uses of a public street, with sidewalk, curbing and other street improvements, is not an "approach to the bridge," which the railroad company is forever bound to maintain and keep in surface repair.—State v. Great Northern R. Co. (Minn.), 161 N. W., 596.

Collection of Freight Charges.—The Circuit Court of Appeals, Fifth Circuit, holds that, though the carrier can, notwithstanding the usual clause of the bill of lading as to delivery to the consignee on payment of the freight, and regardless of the ownership of the goods, waive its lien and recover the freight charges from the consignor, where the carrier attempts to collect from the consignee, but through error collected only part of the amount due, and could thereafter have collected the balance from the consignee who owned the goods, from other goods in its possession, it will be bound by its election to collect from the consignee and not permitted to sue the consignor for the balance.—Yazoo & Mississippi Valley R. Co. v. Zemurray, 238 Fed. 789.

Railroads—Crossings—Contributory Negligence.—The greater the difficulty of seeing and hearing an approaching train as it nears a crossing, the greater caution the law imposes upon the traveler and in the country he must stop, look and listen before going upon the tracks. If he fails to exercise ordinary care and is injured by a passing train, he cannot recover, although the train crew may have been negligent also. Perrin v. New Orleans Term. Co. (La.), 74 So., 160.

Pedestrians Crossing Railroad Bridge Held Trespassers.—The Kentucky Court of Appeals holds that it is the established rule in that state that persons who use a railroad bridge for their own convenience are trespassers, and their status as such cannot be changed to that of licensees by the frequency and extent of such trespassing. A railroad bridge was without planking for foot passengers, and there was no place, except at the piers, where a pedestrian could stand and clear a passing train. Signs warned the public not to use the bridge. The court holds that the company could not be held to have acquiesced in the use of the bridge as a highway for pedestrians, and was not liable for the death of a person attempting to walk across it.—McCoy v. Williamson & Pond Creek R. Co. (Ky.), 192 S. W. 45.

Intoxicating Liquors—Prohibited Territory.—In a prosecution against a carrier for violating the Kentucky statute by transporting into territory where the sale was prohibited liquor which was not intended by the consignee for his personal and family use, the Kentucky Court of Appeals holds that, as the carrier is not liable unless the statement that the liquor was intended for personal and family use was false, the carrier cannot be convicted, though its agent believed the statement was false, and an instruction to the jury so declaring was improper. The carrier is liable only if the statement was false and it knew or was charged with knowledge of facts which would have informed a reasonably prudent person that the statement was false.—Adams Express Co. v. Commonwealth (Ky.), 192 S. W. 56.

Shipment "Freight Collect"—Liability of Consignor.—Lumber was delivered to a carrier under a bill of lading, naming the consignee, and showing that the lumber was to be shipped "freight collect." The carrier tendered the lumber to the consignee, who refused to receive it or pay the freight charges after due notice. The consignor was within a reasonable time thereafter notified of this refusal, but took no steps to pay the freight charges or take care of the lumber. The carrier in conformity with law sold the goods to enforce its lien for charges, and there was still a balance due, for which it sued the consignor. The Texas Court of Civil Appeals held that the consignor was liable for such balance, since the liability of the consignor with whom a contract of shipment is made for the freight charges provided for therein exists regardless of whether or not the consignee is the owner, and irrespective of the failure of the carrier to collect freight from the consignee. Miller & Vidor Lumber Co. v. Atchison, T. & S. F. Co. (Tex.), 192 S. W. 354.

Unblocked Frog.—The doctrine laid down in the Supreme Court of the United States that it is not negligent for a railway company to have in its yards and on its tracks unblocked frogs, as was decided in the cases of Southern Pacific v. Seley, 152 U. S. 145, and Kilpatrick v. Choctaw, Oklahoma & Gulf Ry., 195 U. S. 624, was affirmed and followed in the late case of St. Louis, M. B. & T. Ry. Co. v. Schuerman, 237 Fed. 1.

Federal Employers' Liability Act—Scope of Employment.—In an action brought under the Federal Employers' Liability Act for the death of a section foreman who was stabbed by a Mexican employed under him, the petition alleged that the deceased more than once notified his superior officers that the Mexican was a dangerous man and he could not get along with him: that the Mexican had shot one or two men; that the superior officers had answered that he had nothing to fear, and that the company would protect him; that he continued in his work and was stabbed and killed by the Mexican without warning and without provocation. The Kansas Supreme Court held that, on the facts alleged in the petition, no cause of action was stated under the act, for the reason that on the undisputed facts the assault was not committed in the course or scope of the Mexican's employment, nor in the furtherance of the defendant's business. Roebuck v Atchison, T. & S. F. R. Co. (Kan.), 162 Pac. 1153.

Transporting Liquor to Dry Territory.—In an action in equity at the relation of the prosecuting attorney of Worth County, Missouri, to restrain the defendant railroad from receiving intoxicating liquors and delivering to persons in that county, the Kansas City Court of Appeals holds that the shipment of intoxicating liquor into a local option county by a common carrier cannot be enjoined by a court of equity regardless of the criminality of the act, where such shipment did not result in the maintenance of a public nuisance, it not appearing that the shipment resulted in drunkenness. If the defendant's act came within the category of a violation of the Missouri statute relating to the delivering of liquor into local option counties, which the court did not decide, the remedy in such a case would be to proceed under the criminal statutes. A court of equity has no jurisdiction to enjoin an act merely because it is criminal.—State v Chicago, B. & Q. R. Co. (Mo.), 191 S. W. 1051.

Noise from Spur Track Switching.—After the construction of a railroad's main line, a citizen acquired a residence a short distance from the right of way. Thereafter, to furnish facilities to a compress company, the railroad over its own property completed a spur track leading to the compress. The noise of switching annoyed the resident and his faimily. The Mississippi Supreme Court holds, in an action for damages on account of the noise, that as the railroad could have been compelled to construct the spur track to furnish facilities, and had no option in the matter, and that in so doing it was carrying on the business for which it was organized, the plaintiff could not recover.—Dean v. Southern R. Co., (Miss.) 73 So., 25.

Crossing Accident—Contributory Negligence—Special Train.—In an action arising out of a crossing accident, it is no defense where the driver of the team struck was guilty of contributory negligence to show that this was a special train not operated on regular schedule. Larabee v. Western Pac. Ry. Co. (Cal.), 161 Pac. 750.

INTERSTATE COMMERCE COMMISSION DECISIONS.

MINIMUM WEGHTS

Shipment weighed 54,100 pounds, 29,600 in one car and 24,500 in the other, and was delivered the Southern at Chattanooga consigned to Manila, P. I., routed "M. & O. at Corinth, M. P. at St. Louis, D. & R. G., Western Pacific c/o Steamship Siberia," and moved as routed. Charges collected at combination of $1.10; 35 cents, Chattanooga to St. Louis, and 75 cents beyond. Rate of 75 cents was applicable upon carload minimum of 36,000 pounds, and shipment as a whole was not entitled to that rate unless first car was charged on basis of carload minimum or weight in excess thereof. Undercharge of $48—6,400 pounds at 75 cents per 100. Walsh & Weidner Boiler Co. v. Sou. Ry. Co., 41 ICCR 621.

REITERATION OF PRINCIPLE THAT SHIPPERS ARE CHARGED WITH KNOWLEDGE OF LEGAL RATES—ROUTING

In above case it appeared that there was a rate of 75 cents from Cairo (through which shipment moved to St. Louis) to Manila, but the M. & O. was not a party thereto. Contention is M. & O. should have delivered shipment to I. C. or M. P. at Cairo instead of St. Louis, in which case combination of $1.00 (25 cents, Chattanooga to Cairo and 75 cents beyond) would have applied. HELD, Shippers are chargeable with knowledge of legal tariff rates and definite specification of more expensive of two or more routes relieves carriers of duty of forwarding over cheapest route. Walsh & Weidner Boiler Co. v. Sou. Ry. Co., 41 ICCR 621.

MISTAKE OF AGENT IN QUOTING RATE

Carrier's agent erroneously informed shipper that desired destination was without railway connections and shipper accordingly consigned to another point which agent told him was nearest point to which shipments could be delivered by rail. When shipments arrived there shipper found that it would have been possible to ship direct to desired destination. By rebilling and draying shipper incurred greater expense than if he had shipped direct at the through rate. Shipper alleged he was compelled to pay unreasonable charges due to erroneous information furnished by the agent, but HELD, following Poor Grain Co. case, 12 ICCR 469, such mistake of an agent does not constitute violation of the Act of Regulate Commerce, and will relieve neither shipper nor carrier from obligation of law's requirement, which is that the carrier must collect and shipper must pay rate as published for route over which shipment moved by direction of shipper, even though agent had misinformed him. Fifer Lumber Co. v. Great Northern Ry. Co., 42 ICCR 13.

RECONSIGNMENT

After arrival of shipment at original destination, complainant ordered it reconsigned and also name of consignor changed. No through rate to a final destination from point of origin and combination on original destination charged. Complainant claims benefit of lowest possible combination, which was lower than combination on original destination. Carrier insisted that change in name of consignor was not permissible under reconsignment, and this was not a reconsignment, but two distinct shipments, and therefore, not the lowest possible combination, but combination on original destination, should be charged. Carrier's argument was based on Conference Ruling No. 72, which is "that without specific qualification, the term 'reconsignment' includes changes in destination, routing or consignee," and as this was also change in consignor, it was without the Commission's definition of reconsignment. HELD, This construction was too narrow—that the enumeration of what the term includes was merely illustrative, and that this was a reconsignment and lowest possible combination should be charged. Atwood v. Baltimore & Ohio R. F. Co., 42 ICCR 385.

MISROUTING

Shipment was delivered to Tallulah Falls Railway at Franklin, N. C., consigned to E. New York station, Brooklyn, N. Y., routed "via P. R. R.-L. I. R. R." and rate of 29.5 cents entered on bill of lading. At the time the rate was 33.5 via Southern and Pinners Point and N. Y. P. & N. The Southern forwarded via Potomac Yards. Complainant contends shipment should have moved via Pinners Point. HELD, Shipper's routing was incomplete, as there is no connection between Tallulah Falls Railway and the Pennsylvania, and stipulated rate did not apply over any route. Therefore it was the duty of initial carrier to seek further instructions, and if they could not be secured, to route shipment over cheapest reasonable available route consistent with routing instructions given by shipper. Shipment was misrouted by initial carrier in that it failed to route via Pinners Point. Reynolds Bros. Lbr. Co. v. Tallulah Falls Ry. Co., et al., 42 ICCR 421.

LOWEST COMBINATION APPLIES WHEN THERE IS NO THROUGH RATE

Shipment originated at Wellborn, Ind., destined to Bryan, O. Shipper did not specify routing and initial carrier's agent routed to Evansville, L. H. & St. L. to Louisville, L. & N. to Cincinnati, Cincinnati Northern to destination. No joint rate applied and combination of 33 cents, composed of commodity rate of 18 cents, Wellborn to Cincinnati, and fourth class rate of 15 cents, Cincinnati to Bryan, was charged. Contemporaneously a combination of 23.5 cents composed of a proportional of 4 cents, Wellborn to Evansville and 19.5 cents beyond applied. HELD. Shipment was misrouted and complainant was damaged to extent of difference between 23.5 and 33 cents. McClintick & Co., v. Louisville & N. R. R. Co., 42 ICCR 429.

Railroads—Injuries to Persons on Bridge.—Members of the public who use a railroad bridge for their own convenience are trespassers and their status as such cannot be changed to that of licensees by the frequency or extent of such trespassing. McCoy's Admr. v. Williamson & P. C. R. Co. (Ky.), 192 S. W. 45.

Passenger and Carrier—Termination of Relation.—A passenger, who had paid his fare between certain points on the line, left the train during a short stop at an intermediate station, and went to a restaurant a block and a half away for refreshments. When he returned to the station he found that his train had gone. He took passage on a freight train without payment of fare, with the consent of the engineer, riding on a platform car loaded with rock, from which he was thrown by a violent jerk of the train, and injured. He sued the company, contending, first, that the relation of passenger and carrier had not expired at the time of the injury; and second, that if he was a trespasser he was entitled to recover because of the company's willful negligence. The Minnesota Supreme Court held (1) that the relation of passenger and carrier ceased on the plaintiff's failure to return to the station in time to resume his journey on the train, and that he had no right as a matter of law to continue the journey on some other train without further payment of fare; and (2) that he was not a passenger while riding on the freight train. The engineman was without authority to accept him as a passenger, and he was in fact and law a trespasser thereon. The evidence did not require the submission of the case to the jury on the question of willful negligence. Judgment for the defendant on a directed verdict was affirmed. Tuder v. Oregon Short Line R. Co. (Minn.), 160 N. W. 785.

Exemption From Liability for Fire From Engine.—A lease of a portion of a right of way for manufacturing plant provided that the railroad should not be liable for damages by fire communicated from its locomotives, though the result of negligence. It provided that on termination of the lease, according to an option reserved to either party, the lessee should remove at once from the premises all structures and property not belonging to the road. The plant with its contents was destroyed by fire from the company's locomotives after the termination of the lease by the lessee, who had continued in possession of the premises, without any new lease or new arrangement as to possession. The Federal District Court for the Southern District of Iowa holds that by continuing in possession in violation of his covenant to remove, the lessee was bound by his covenant freeing the railroad from liability for fires from locomotives. The contents of the plant were mortgaged, and the mortgagee had no notice, actual or constructive, of the lease or the exemption. It was held that the mortgagee might recover from the railroad where the mortgaged property was burned through the company's negligence; that the covenant should be construed merely as a contract of indemnity—an agreement by the lessee to indemnify the railroad for any loss it might sustain by reason of being held liable for negligence, which resulted in the destruction of property on the leased premises. Milton Mfg. Co. v. Chicago, B. & Q. R. Co., 237 Fed. 118.

Pecuniary Loss—Dependency of Half-Sister.—A Mexican section hand, who was killed on the railway, left as his only next of kin a half-sister. On the issue of her dependency on which to base recovery under the Federal Act the half-sister testified that decedent sent her different sums—$10, $12, $15. In December, 1913, a month before his death, he sent her $10, presumably as a Christmas gift. The verdict of the jury for $1,500 was set aside by the trial court on this evidence as excessive. Affirming this action the Court of Appeals (Kansas City) said: "The most that the evidence shows is that the deceased several times gave her a sum of money. But mere occasional gifts do not make the recipient 'dependent' upon the giver within the meaning of the statute. True, the Act does not require that the dependency must be complete or entire. A partial dependency will be sufficient to furnish the basis of an award in some amount. But dependency, either in whole or in part, must exist. It is a state or relation. Dependence is 'the state of relying upon something or someone, as for anything necessary or desirable.' (New Standard Dictionary.) It has in it also something of the idea of continuity of reliance so to speak." Smith v. Pryor, Receiver, (Mo. App.), 190 S. W. 69.

Injury to Servant While Attempting to Save Property of Master.—Contributory Negligence.—In an action for damages for personal injuries, received in an effort to save property from danger to which it was subjected by the alleged negligence of another, there can be no recovery where it appears that the injured person exposed himself recklessly, or failed to exercise such care as a reasonably prudent man would have exercised under similar circumstances; the rule in such cases being different from that which obtains where injuries are received in an effort to save human life. Mathis v. Kansas City Sou. Ry. Co. (La.), 74 Sou. 172.

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THE MEMORANDUM

Vol. II No. 10

LAW DEPARTMENT MAY, 1917. SOUTHERN RAILWAY COMPANY

LAW OF CARRIERS OF GOODS IN INTERSTATE COMMERCE—COMMENTS UPON DEVELOPMENTS OF THE LAST FIVE YEARS.

Prior to the enactment of the Hepburn Act in 1906, the rights and obligations of shippers and carriers of goods in interstate commerce were largely controlled by the statutes and common law of the particular state the law of which was applicable. The decision of a state court could not be reviewed by the federal Supreme Court because of the absence of a federal question.[1] True there was a body of law which may be called the general common law obtaining in the federal courts,[2] which was applied by the federal courts in cases where no state law controlled but in the great bulk of cases the federal law did not come into play.

After the enactment of the Hepburn Act, certain provisions of section 20 of which are known as the Carmack Amendment, this situation was completely changed, though it was some time before the profession and the public concerned awoke to the far-reaching character of the change.

Provisions of the Hepburn Act were relied on, as changing the pre-existing law, by the plaintiff in error in Southern Ry. Co. v. Reid,[3] (January, 1912), where a state statute imposing penalties for failure of a carrier immediately to receive shipments was held invalid as applied to an interstate shipment, the decision being rested upon provisions of the Act to Regulate Commerce, primarily upon that provision of the Hepburn Act (Sec. 1 of the Act to Regulate Commerce as amended) which required transportation to be furnished upon reasonable request, by which provision Congress was held to have assumed exclusive control of the subject matter involved.

There was grave doubt of the constitutionality of the Carmack Amendment until its validity was sustained by the Supreme Court, (January, 1911), in Atlantic Coast Line R. Co. v. Riverside Mills.[4] It was then, of course, realized that the initial carrier could be held liable for the default of its connecting carrier in case of loss or damage to goods shipped in interstate commerce, but it was not until the decision of the Supreme Court in Adams Express Company v. Croninger,[5] (January, 1913), that it began to be seen that the Carmack Amendment had placed the whole subject of loss and damage to interstate shipments within the aegis of federal law, and that a federal question existed in every such case by virtue of that enactment. In the Croninger case it was held that the shipper of an express package which was lost in interstate transit could not recover its full value but was bound by the valuation stipulated in the receipt and provided, as a limitation upon the amount of recovery, in tariffs duly established under the Interstate Commerce Act by filing with the Interstate Commerce Commission. While the court discussed and relied upon the Carmack Amendment, the decision might well have been rested, altogether aside from the provisions of that amendment, upon the provisions of section 6 of the Act, authorizing and requiring carriers to show in their tariffs filed with the Interstate Commerce Commission all "rules or regulations which in any wise change, affect or determine * * * the value of the service rendered to the passenger, shipper, or consignee," the provision of such tariffs fixing the valuation of the goods in accordance with the rate paid, and the provisions of the Act making rates and provisions required to be and shown in duly established tariffs binding upon shipper and carrier.

The court's decision, however, was placed upon the ground that the effect of the Carmack Amendment was, in case of loss or damage to freight shipped in interstate commerce, to supersede state law and to substitute therefor the federal law declared by the Carmack Amendment. The effect of this Amendment is, in addition to the imposition of liability upon the initial carrier in case of loss or damage caused by a connecting carrier, in effect to incorporate the general common law obtaining in the federal courts into a legislative enactment and to codify it as the body of law exclusively controlling the subject matter.

The Croninger case was followed in Missouri, K. & T. Ry. Co. v. Harriman,[6] where a provision in an interstate bill of lading requiring suit to be brought within a limited time, which had been held invalid by the Texas courts applying the Texas law, was tested by the federal law and upheld.

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[1] Pennsylvania R. Co. v. Hughes, 191 U. S. 477.
[2] Hart v. Pennsylvania R. Co. 112 U. S. 338; Adams Express Company v. Croninger, 226 U. S. 504; M. K. & T. Ry. Co. v Harriman, 227 U. S. 657.
[3] 222 U. S. 424.
[4] 219 U. S. 186 (See G. H. & S. A. Ry. Co. v. Wallace, 223 U. S. 481, and N. & W. Ry. Co. v. Dixie Tobacco Co., 228 U. S. 593).
[5] 226 U. S. 491.
[6] 227 U. S. 657.

The effect of the Act to regulate commerce as amended by the Hepburn Act is illustrated by the following cases.

In Chicago & Alton Ry. Co. v. Kirby,[7] it was held that an agreement by a carrier to give a shipment special service or an expedited movement was invalid in the absence of a tariff provision providing for such special service or movement upon terms open to all.

In Kansas City Southern Ry. v. Carl,[8] the limitation of value contained in the bill of lading and tariff restricting the amount of recovery in case of loss of or damage to household goods was held to be valid and binding.[9]

In Chicago, R. I. & P. Ry. Co. v. Hardwick Farmers Elevator Co.,[10] it was held that the provision of the Hepburn Act (Section 1), requiring carriers "to provide and furnish transportation upon reasonable request therefor" nullified a statute of Minnesota imposing penalties for failure to furnish cars within a specified time.

A similar case was St. Louis, &c., Ry. Co. v. Edwards,[11] in which a statute of Arkansas penalizing the carrier for failure to give notice of arrival of goods to the consignee was held invalid by reason of the provisions of Section 1 of the Hepburn Act.[12]

Prior to the decision in Charleston, &c., Ry. Co. v. Varnville Furniture Company,[13] carriers had been subjected to an increasing burden by reason of state statutes imposing penalties for failure to pay freight claims (for loss, damage, or overcharge), within a specified time.[14] In that case such a state statute was held invalid as applied to interstate shipments because inconsistent with provisions of the Hepburn Act.

In Cleveland &c., Ry. Co. v. Dettlebach,[15] it was held that the limited valuation stipulated in the bill of lading and provided for in the tariff was applicable and binding though the goods had reached destination and were held by the railroad company as warehouseman.

In Southern Express Co. v. Byers,[16] an action for damages for mental suffering growing out of delay in the transportation of a corpse in interstate commerce, the court held that under the federal law such damages were not recoverable.

In New York, P. & N. R. Co. v. Peninsula Produce Exchange,[17] it was held that the Carmack Amendment imposed liability upon the initial carrier for loss in market value of a shipment of perishables due to delay on the line of a connecting carrier. In supporting this construction of the Amendment the Court referred to Act of January 20, 1914,[18] which provides "that no suit brought in any state court of competent jurisdiction against a railroad company * * * to recover damages for delay, loss of, or injury to property received for transportation by such common carrier under Section twenty (Carmack Amendment) of the Act to Regulate Commerce * * * shall be removed to any court of the United States where the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of $3,000."

Southern Railway Co. v. Prescott[19] is an interesting and important case. Nine boxes of shoes consigned in interstate commerce to Prescott at Edgefield, S. C., were destroyed by fire while in possession of Southern Railway Company at that point. After notice of arrival of the goods at destination, consignee paid the entire freight charges, receipted for the goods, and removed four boxes leaving the remaining nine to be removed later, the agent testifying that he made no charge for storing them. In this situation the goods were burned. The railway company contended that the question of its liability was controlled by federal law and that under that law, after proof by it of the destruction of the goods by fire, the burden of proof was upon the plaintiff to prove that the railway company's negligence caused or contributed to the loss. The trial court held that the contract of transportation had been consummated; that the goods were being held under a new and separate contract; that the South Carolina law was applicable and controlling; and that the burden was upon the railway company to prove that it was not guilty of negligence. The Supreme Court of South Carolina affirmed the judgment of the trial court. The United States Supreme Court reversed the decision of the State Supreme Court, and sustained the contentions of the railway company, declaring that the holding of the goods as warehouseman

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[7]225 U. S. 155.

[8]227 U. S. 639.

[9]Other cases upholding limited valuations are:
Wells Fargo & Co. v. Neiman-Marcus Co., 227 U. S. 469;
Chicago, R. I. & P. Co. v. Cramer, 232 U. S. 490 (limited valuation of hogs);
Great Northern Ry. Co. v. O'Connor, 232 U. S. 508 (limited valuation of household goods and personal effects);
Boston & Maine R. Co. v. Hooker, 233 U. S. 97 (limited valuation of passenger's baggage);
Atchison, &c., Ry. Co. v. Robinson, 233 U. S. 173;
Pierce Co. v. Wells Fargo Co., 236 U. S. 278 (limited valuation of automobiles);
Cleveland, &c., Ry. Co. v. Dettlebach, 239 U. S. 588 (See infra);
Cincinnati, &c., Ry. Co. v. Rankin, 241 U. S. 319 (See infra);
New York, &c. R. Co. v. Beaham, 242 U. S. 148;
Western Transit Co. v. A. C. Leslie & Co., 242 U. S. 448 (See infra).

[10]226 U. S. 426.

[11]227 U. S. 265.

[12]See Hampton v. St. L., &c., Ry. Co., 227 U. S. 456; Yazoo, &c., R. Co. v. Greenwood Grocery Co., 227 U. S. 1.

[13]237 U. S. 597.

[14]Atlantic Coast Line R. Co. v. Mazursky, 216 U. S. 122; M. K. & T. Ry. Co. v. Harris, 234 U. S. 412.

[15]239 U. S. 588.

[16]240 U. S. 612. See DeLoach v. Southern Ry. Co. (S.C.), 90 S. E. 701, an action for delay in the interstate transportation of a still kettle, holding that under the federal law punitive damages are not recoverable for willfulness or wantonness on the part of servants unless it be proved that the master ratified the servants' acts. See also, Harman v. Southern Ry. Co. (S.C.), 90 S. E. 1023.

[17]240 U. S. 34.

[18]C. 11, 38 Stat. 278.

[19]240 U. S. 632.

was a part of "transportation" within the meaning of Section 1 of the Hepburn Act, that the federal law governed the case to the exclusion of the state law, that the tariff provisions could not be altered by the parties,[20] and that the plaintiff had failed to carry the burden to prove negligence imposed upon him by federal law.

Another important decision, following soon after, cleared up a point upon which there had been a great difference of opinion, that is, whether the Carmack Amendment was applicable to a case of conversion by the carrier. Georgia, &c., Ry. Co. v. Blish Milling Co.,[21] was an action in trover in which plaintiff recovered judgment in a Georgia court against the final carrier for the value of a carload of flour consigned by plaintiff in interstate commerce under an order notify bill of lading to a firm at Bainbridge, Ga., to which the defendant (plaintiff in error) made delivery without requiring surrender of the bill of lading. The judgment having been affirmed by the Court of Appeals of Georgia, a writ of error was sued out to the United States Supreme Court. The carrier's defense was based upon a provision of the bill of lading which required "claims for loss, damage, or delay" to be made in writing within four months "after the delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed." The carrier also contended that plaintiff's exclusive remedy was, by virtue of the Carmack Amendment, against the initial carrier. This latter contention, being clearly without merit, was summarily rejected by the Supreme Court. Upon the other point the court declared that the question of the proper construction of the provisions of the bill of lading was one of federal law; that the case was one of "failure to make delivery"; and that the four months clause was applicable and binding. It was argued that the carrier, in misdelivering the goods, abandoned the contract and therefore could not avail itself of the contractual defense based on the provision as to the making of claims, but the court declared that the parties could not waive conditions "fixed by the agreement made under the published tariffs and regulations." The court, however, reached the conclusion that a telegram sent by the plaintiff to the defendant to the effect that the shippers "would make claim against railroad for entire contents of car at invoice price," taken in connection with other telegrams identifying the shipment, was a substantial compliance with the bill of lading provision in question and therefore affirmed the Georgia courts.

In St. Louis, &c., R. Co. v. Starbird,[22] (1917), the Supreme Court enforced a bill of lading provision requiring claims for damages to be reported in writing within thirty-six hours after notice of arrival, shipments of peaches being involved, declaring that the lower court was in error in holding that knowledge on the part of the carrier of the condition of the peaches when they reached destination did not dispense with the necessity of the written notice. The court took occasion to declare that "whether such stipulations are reasonable or not depends on the circumstances of each case." In this connection it should be noted that it does not appear that the carrier introduced evidence that the provisions of its bill of lading had been filed with the Interstate Commerce Commission and the court seems to have decided the case without reference to any question of duly established tariffs. If a stipulation such as that involved in this case had been duly filed as a tariff with the Interstate Commerce Commission in accordance with section 6 of the Act, it would seem that the question of the reasonableness of such provision is (like the question of the reasonableness of a rate) for the determination of the Commission and not a matter for judicial consideration. See the Carl case, 227 U. S., at page 654. If the question of reasonableness of bill of lading provisions is to depend upon the circumstances surrounding each particular case, we are thrown back to the old conditions of uncertainty, discriminations will inevitably arise, and litigation over such matters, much of which will require decision by the United States Supreme Court, will flourish. It is not believed that the court intended to modify the doctrine that regulations and provisions filed with the Commission under the authority of section 6 of the Act have the force of statutory law until set aside by the Commission, unless on their face repugnant to law.

In Cincinnati, &c., Ry. Co. v. Rankin,[23] involving damage to an interstate shipment of cattle, it was held that a stipulation in the bill of lading for a limited valuation was binding notwithstanding the absence of affirmative proof that the published tariffs of the carriers contained alternative rates based on different valuations, the bill of lading accepted by the shipper reciting that alternative rates based on specified value were offered.

In Atchison, &c. Ry. Co. v. Harold,[24] the doctrine that by the Carmack Amendment Congress took exclusive control over the subject of interstate shipments was reaffirmed and applied, and the decision of the Kansas courts investing the innocent holder of a bill of lading with rights not available to the shipper was reversed as being inconsistent with the general commercial law obtaining in the federal courts.

In Western Transit Co. v. A. C. Leslie, &c., Co.,[25] 25 tons of copper ingots were delivered to the defendant (below) at a point in Michigan consigned to New York City, with directions to store same at Buffalo awaiting further orders, this storage in transit privilege without extra charge being provided for in the tariffs. The bill of lading contained the stipulation, "value not to exceed

[20]In Dean v. Southern Ry. Co. (S.C.) 91 S. E. 1042, it was held that a provision of an interstate bill of lading requiring claim to be made in a certain manner could not be waived.

[21]241 U. S. 190.

[22]Decided April 30, 1917. See also Chesapeake, &c., Ry. Co. v. McLaughlin, 242 U. S. 142 and Northern Pac. Ry. Co. v. Wall, 241 U S. 87; dealing with bill of lading provisions as to giving notice of damage or making of claims within a specified time.

[23]241 U. S. 319.

[24]241 U. S. 371.

[25]242 U. S. 448.

$100.00 per net ton." A ton of the ingots was stolen while the property was in storage in Buffalo under circumstances found to be accompanied by negligence on the part of the carrier. The Supreme Court held that the bill of lading governed the storage in transit as well as the actual transportation and that the released valuation applied; and it construed the valuation agreement as fixing "not an arbitrary limit of recovery but a ratio," so that only $100 was recoverable for the stolen ton of ingots.

In Pennsylvania R. Co. v. Olivit Bros., decided by the United States Supreme Court April 30, 1917, involving delay to interstate shipments of melons, the carrier set up bill of lading provisions exempting it from liability for damage resulting from strikes, congestion, and other causes beyond its control, and undertook to prove that the damage was due to such causes. The carrier contended that after it had proved these causes, the burden was upon the plaintiff to prove negligence on the part of the carrier. The Supreme Court apparently upholds this contention, but affirmed the decision in favor of the plaintiff on the ground that there was sufficient evidence of negligence to justify the submission of that issue to the jury. It was also held that the Carmack Amendment gives the cause of action to the "lawful holder" of the bill of lading although he may not be the owner.

We have seen that provisions of the Hepburn Act other than the Carmack Amendment have had a far-reaching effect in revolutionizing the law of interstate carriers. Several cases applying the provisions of section 1 and of section 6 of the Act have been referred to.

Several other interesting cases involving provisions of the Act other than the Carmack Amendment may be referred to.

In A. J. Phillips Co. v. Grand Trunk Western Ry Co.,[26] where a shipper sued in a federal court for the difference between the charges paid upon interstate shipments at the tariff rate and the amount accruing at the rate subsequently, in a proceeding to which plaintiff was not a party, found to be the reasonable charge by the Interstate Commerce Commission, the court was called upon to construe that provision of section 16 of the Act which provided:

> "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after."

The court held that this two-year limitation not only barred the remedy but destroyed the liability and that it applied equally to a suit instituted in a court of competent jurisdiction as to a complaint filed with the Interstate Commerce Commission. It may be remarked that the doctrine laid down in this decision would seem equally applicable to a "straight overcharge," that is, to a charge in excess of that prescribed in the tariff in effect at the time.

The court pointed out in this case that

> "to permit a railroad company to plead the statute of limitations as against some and discriminate against others would be to prefer some and discriminate against others in violation of the terms of the Commerce Act which forbids all devices by which such results may be accomplished";

and that

> "The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier."

In Louisville, &c., R. Co. v. Ohio Valley Tie Co.,[27] suit had been brought in the Kentucky court for damages alleged to have been caused account of injury to plaintiff's business by reason of the maintenance and collection by the carrier of a higher rate for the transportation of cross ties (in interstate commerce) than for lumber, it being charged that the establishment and maintenance of the higher cross-tie rate was for the purpose of discouraging plaintiff from competition with the defendant in the purchase of cross ties. Prior to institution of the suit, plaintiff had, in a proceeding before the Interstate Commerce Commission, obtained reparation upon a number of shipments of cross ties and an order requiring the establishment of a rate for ties not to exceed the rate on lumber of the same kind of wood. The state court held that under the Act to Regulate Commerce the Interstate Commerce Commission had gone to the limit of its power in granting reparation in the amount of the difference between the amount charged and that accruing at the rate held to be reasonable and that it was open to the court to award (so-called) general damages for the injury to plaintiff's business in addition to the reparation awarded by the Commission. Accordingly judgment was given for plaintiff. The Supreme Court reversed the judgment. It referred to section 8 of the Act making the carrier liable to any person violating the Act "for the full amount of damages sustained in consequence" of the violation; to section 9 permitting any person so injured to make complaint to the Commission or to sue in a United States Court, at his election, to secure redress; and to section 16 giving the Commission power to award damages and providing for suit upon such award if not paid. Accordingly, it was held that

> "all damage that properly may be attributed to an overcharge, whether it be the keeping of the plaintiff out of its money, dwelt upon by the trial court, or the damage to its business following as a remote result of the same cause, must be taken to have been considered in the award of the Commission and compensated when that award was paid."

This decision overrules the Commission's interpretation of the Act, uniformly adhered to, under

[26] 236 U. S. 662.

[27] 242 U. S. 288.

which the award of general damages was thought to be beyond the Commission's power under the Act.

The delimitation of the respective powers of the Interstate Commerce Commission and of the courts in matters involving interstate transportation by carriers subject to the Act to Regulate Commerce, has received considerable consideration at the hands of the Supreme Court. The leading case is Texas & Pacific Ry. Co. v Abilene Cotton Oil Co.,[28] (1907), where it was held that the courts have no power to consider the question of the reasonableness of duly established interstate rates nor, independently of prior action by the Interstate Commerce Commission, to entertain suit seeking damages based on having been forced to pay excessive rates.

In Interstate Commerce Commission v. Illinois Central R. Co.,[29] (1910), the carrier undertook to enjoin the enforcement of an order of the Commission prescribing a method for the distribution of coal cars in times of car shortage, the order requiring the carrier to count cars delivered to a mine for the carrier's own fuel to be counted against the mine's share of the available supply. The court, in refusing to set aside the order of the Commission, laid down the following as the only questions for judicial consideration in determining whether an order of the Commission should be set aside (p. 470):

> "(a), all relevant questions of constitutional power or right; (b), all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c), a proposition which we state independently, although in its essence it may be contained in the previous one, viz.: whether, even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it, in truth, to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power."

This case was immediately followed by Baltimore & Ohio R. Co. v. Pitcairn Coal Co.,[30] where the coal company sought to obtain a writ of mandamus requiring the carrier to distribute its coal cars in time of car shortage in accordance with a method deemed by the coal company to be required by law. The court, in holding that mandamus would not lie because its issuance would trench upon the exclusive power of the Interstate Commerce Commission conferred by the Act, declared that the remedies offered by section 23 of the Act

> "must be limited either to the performance of duties which are so plain and so independent of previous administrative action of the Commission as not to require a prerequisite exertion of power by that body, or to compelling the performance of duties which plainly arise from the obligatory force which the statute attaches to orders of the Commission, rendered within the scope of its authority, until such orders are set aside by the Commission or enjoined by the courts."[31]

THE CUMMINS ACTS.

The Carmack Amendment was amended March 4, 1915, by the first Cummins Act[32] and on August 9, 1916, by the second Cummins Act.[33] The first Cummins Act was enacted as a result of the decisions of the Supreme Court in the Croninger and like cases, being principally designed to prevent limitations of liability in certain circumstances and the second Cummins Act was enacted to narrow in certain respects the broader scope which had been given to the Carmack Amendment by the first Cummins Act. Neither of the Cummins Acts has as yet come before the Supreme Court.

The Carmack Amendment, as amended by the two Cummins Acts, is as follows:[34]

> "Any common carrier, railroad, or transportation company subject to the provisions of this Act receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, District of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever, shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed; and any such common carrier, railroad, or transportation company so receiving property for transportation from a point in one State,

[28] 204 U. S. 426.
[29] 215 U. S. 452.
[30] 215 U. S. 481.

[31] For other cases involving the spheres of the Commission and of the courts, respectively, as marked out by the Supreme Court, see:
Pennsylvania R. Co. v. Puritan Coal Co., 237 U. S. 121;
Illinois Central R. Co. v. Mulberry Hill Coal Co., 238 U. S. 275; Pennsylvania R. Co. v. Clark Coat Co., 238 U. S. 456; Pennsylvania R. Co. v. Sonman Shaft Coal Co., 242 U. S. 120; Pennsylvania R. Co. v. Stineman Coal Mining Co., 242 U. S. 298.

[32] 38 Stats. at Large, 1196.

[33] 39 Stats. at Large, 441.

[34] 8 U. S. Comp. Stats. Anno., Sections 8604a and 8604aa. pp. 9289 and 9311; 24 Stat. 386, 34 Stat. 595; 38 Stat. 1196, 39 Stat. 441.

Territory, or the District of Columbia to a point in another State or Territory, or from a point in a State or Territory, to a point in the District of Columbia, or from any point in the United States to a point in an adjacent foreign country, or for transportation wholly within a Territory shall be liable to the lawful holder of said receipt or bill of lading or to any party entitled to recover thereon, whether such receipt or bill of lading has been issued or not, for the full actual loss, damage, or injury to such property caused by it or by any such common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, notwithstanding any limitation of liability or limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void: Provided, however, That the provisions hereof respecting liability for full actual loss, damage, or injury, notwithstanding any limitation of liability or recovery or representation or agreement or release as to value, and declaring any such limitation to be unlawful and void, shall not apply, first, to baggage carried on passenger trains or boats, or trains or boats carrying passengers; second, to property, except ordinary live stock, received for transportation concerning which the carrier shall have been or shall hereafter be expressly authorized or required by order of the Interstate Commerce Commission to establish and maintain rates dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property, in which case such declaration or agreement shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released, and shall not, so far as relates to values, be held to be a violation of section ten of this Act to regulate commerce, as amended; and any tariff schedule which may be filed with the commission pursuant to such order shall contain specific reference thereto and may establish rates varying with the value so declared or agreed upon; and the commission is hereby empowered to make such order in cases where rates dependent upon and varying with declared or agreed values would, in its opinion, be just and reasonable under the circumstances and conditions surrounding the transportation. The term 'ordinary live stock' shall include all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses: Provided further, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under the existing law: Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The amendments to the Carmack Amendment deal primarily with the amount of liability as distinguished from the question of the circumstances under which liability exists. Before, however, considering questions of the amount of liability where the carrier is liable, let us consider whether the general common law of the federal courts is modified (aside from the question of liability of the initial carrier for loss or damage occurring on the lines of its connecting carriers) by the Carmack Amendment as amended.

The statute imposes liability on the carrier "for any loss, damage, or injury caused by it" or by the connecting carrier and provides that "no contract, receipt, rule regulation, **or other limitation of any character whatsoever**" shall exempt the carrier from "the liability hereby imposed." The words in black face were added by the first Cummins Act, as was also the following language:

> "and any such common carrier * * * shall be liable * * * for the full actual loss, damage, or injury to such property caused by it or by any such common carrier * * * to which such property may be delivered or over whose line or lines such property may pass * * * notwithstanding any limitation of the amount of recovery or representation or agreement as to value in any such receipt or bill of lading, or in any contract, rule, regulation, or in any tariff filed with the Interstate Commerce Commission; and any such limitation, without respect to the manner or form in which it is sought to be made is hereby declared to be unlawful and void."

In Missouri, K. & T. Ry. Co. v. Harriman, supra, the Supreme Court defined the liability imposed by the original Carmack Amendment as follows:

> "The liability imposed by the statute is the liability imposed by the common law

upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence."

The original Carmack Amendment, then, did not affect the common law exceptions to the liability of the carrier as insurer, such as those obtaining in case of loss or damage due to act of God, the public enemy, etc., nor did it prevent the carrier from contracting against liability for loss or damage not caused by its negligence. We do not believe that this situation has been changed by the Cummins Act.[35]

Coming to the question of the amount of liability, where the carrier is liable, it is plain, of course, that no attempt to limit liability to a specific sum is valid save in the case of baggage and in the cases where, except where ordinary live stock is involved, the Commission shall authorize interdependent rates and declared or agreed valuations.[36] There is, however, a serious controversy as to whether the Cummins Amendments invalidate an agreement, such as is contained in the present bills of lading, to the effect that in case of loss or damage the basis of liability shall be the value of the shipment at place and time of shipment. On the one hand it is argued that, as the Act makes the carriers liable for "full, actual loss, damage, or injury" to the property and invalidates "any limitation of liability or limitation of the amount of recovery or representation or agreement as to value," the agreement in question would be invalid as an attempt by contractual limitation to modify the measure of damages obtaining at common law (based on destination value), and to restrict the recovery for loss, damage or injury to such property in direct conflict with the provisions of the Act. On the other hand, it is contended that the stipulation in question was upheld (even in case of the carrier's negligence) at common law; that the provision of the unamended Carmack Amendment making the carrier liable for "any loss, damage or injury to the property" was not construed to invalidate such provision; that the history of the Act indicates that it was not the purpose of Congress to invalidate the provision in view of its desirability as promoting uniformity, in minimizing discrimination, and in expediting the settlement of freight claims; that it is not lightly to be inferred that it was the intention to invalidate it; and finally that it does not exempt the carrier from its liability in whole or in part but simply takes the value at point of origin as the full actual value.[37] See In Re The Cummins Amendment, 33 I. C. C. 682, 693.

This question, among others, is before the Interstate Commerce Commission in a proceeding[38] in which the Commission is formulating a uniform bill of lading to be prescribed for rail and water carriers subject to the Act to Regulate Commerce, the case having been submitted by carriers and shippers on oral and written argument several months ago.

Attention is called to the last two provisions of the Carmack Amendment as amended.

The last proviso is obscure and ungrammatical. These provisos do not invalidate clauses requiring notice of claim to be given within a period of not less than 90 days and claim to be filed within a period of not less than four months except in case of loss, damage or injury, "due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence."

It is plain that loss or damage in transit which is not attributable to the carrier's negligence is not affected. The provision is in some respects difficult to construe. Suppose, for example, wheat is lost from a car in transit by leakage due to the carrier's negligence: In such case, can it be said that the property is "damaged in transit by carelessness or negligence" (assuming that a construction of the Act requires the insertion of the words "the property was" before the words last above quoted)?

THE POMERENE ACT.

On August 29, 1916, Congress enacted an act entitled "An Act relating to bills of lading in interstate and foreign commerce," effective January 1, 1917, known as the Pomerene Act.[39]

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[35]The writer's views on this question are set forth in **The Memorandum** for April, 1916.

[36]In a proceeding styled "In the Matter of Express Rates, Practices, Accounts, and Revenues—Released Rates" (decided April 2, 1917), 43 I. C. C., 510, the Commission authorized the express companies to file tariffs providing for express rates dependent upon the value of the property as declared in writing by the shipper or agreed upon in writing, except as to ordinary live stock. The Commission disapproved the practice of maintaining rates for the transportation of ordinary live stock based on actual value and further declared that rates based on actual value cannot be lawfully maintained upon any other character of traffic except under the authorization of the Commission. In making this declaration, the Commission could not, of course, have intended to refer to baggage which is excepted from the prohibition against limitations of amount of recovery, no authorization by the Commission being necessary. There are many tariffs on file with the Commission applicable to various classes of property (e. g., household goods, marble, etc.), including ordinary live stock, under which the rate varies with the actual value of the property, which tariffs have not been authorized by the Commission. The theory of the carriers filing these tariffs is that while they cannot have the effect of limiting the amount of recovery to the value declared by the shipper to be the actual value yet a shipper will be deterred by the criminal provisions of Section 10 of the Act from stating a false value. It will be noted that in the Express case above referred to the Commission expresses disapproval of such tariffs.

[37]See In Re The Cummins Amendment, 33 I. C. C., 682 and 693.

[38]I. C. C. Docket No. 4844.

[39]39 Stat. 538, 8 U. S. Comp. Stats. Anno., p. 9311, Secs. 8604aaa et seq.

The bill out of which this act grew is the so-called Uniform Bills of Lading Bill adopted by the Commissioners on Uniform State Laws and endorsed by the American Bar Association which has been introduced into the legislatures of all the states and enacted by a number of them. Congress amended the bill in some important particulars. The Act is in the main an attempt to codify the common law relating to the subject matter, but it makes some substantial changes therein.

One of the most important changes made in the common law by this Act is found in section 22 which provides:

> "That if a bill of lading has been issued by a carrier or on his behalf by an agent or employee the scope of whose actual or apparent authority includes the receiving of goods and issuing bills of lading therefor for transportation in commerce among the several states and with foreign nations, the carrier shall be liable to (a) the owner of goods covered by a straight bill subject to existing right of stoppage in transitu or (b) the holder of an order bill, who has given value in good faith, relying upon the description therein of the goods, for damages caused by the non-receipt by the carrier of all or part of the goods or their failure to correspond with the description thereof in the bill at the time of its issue."

This provision reverses the rule of the federal common law under which the carrier was held liable only for the goods received regardless of contrary recitals in the bill of lading issued by its agent.

The provisions of sections 20 and 21 require the carrier in certain cases to ascertain what is delivered to it and in such cases prohibit the carrier from inserting in its bill of lading "shippers' weight, load, and count," or other words of like import and nullifies such words if so inserted.

The Act makes "order" bills of lading negotiable paper.

Section 3 defines order bills as follows:

> "That a bill in which it is stated that the goods are consigned or destined to the order of any person named in such bill is an order bill."

Prior to the time when the Act went into effect, property covered by a bill of lading under which the goods were consigned to the order of the consignee could be delivered to such consignee or upon his order without requiring production and surrender of the bill of lading, the situation being the same as if the goods had been consigned simply to John Doe, consignee.

Such a bill is now negotiable and the carrier must make delivery only upon surrender of the bill, properly endorsed.[40]

Prior to the passage of the Act it was generally held that when the carrier delivered goods (although) covered by an order bill to the party entitled to delivery, the bill thereby became functus officio and the transfer or attempted negotiation thereof after delivery of the goods conferred no rights upon the transferee. This is changed by section 12 of the Act.

The Act contains a number of other provisions changing or adding to the common law, such as the provisions[41] authorizing the court to order the delivery of goods covered by a lost, stolen or destroyed bill, upon requiring adequate security to be given the carrier and the provisions[42] for interpleader at the instance of the carrier.

The Hepburn Act, under the broad construction placed upon its provisions by the decisions of the Supreme Court, has proved a blessing to shippers and carriers alike. So far as interstate and foreign commerce is concerned, it has substituted one uniform body of law for the diverse rules of law, statutory, judicial and otherwise, of the forty-eight states. Questions of the conflict of laws, frequently difficult and perplexing, have been eliminated. Discriminations between shippers, which inevitably arose in many forms from the diversity of state law, have been removed. There is a single tribunal for the final settlement of doubts and disputes, and litigation involving the respective rights, obligations, and liabilities of shippers and carriers of goods in interstate commerce is rapidly diminishing.

The beneficent results of the substitution of one for forty-nine masters in respect to this branch of the activities of interstate carriers and the application thereto of a single code of law should point the way to other much needed reforms in our method of dealing with these great instrumentalities of commerce.

JOHN K. GRAVES.

Note.—See Gulf, &c. Ry. Co. v. Texas Packing Co., decided by U. S. Sup. Ct., May 7, 1917, digested on page 114 of this issue. J. K. G.

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[40]Sec. 8.

[41]Sec. 14.

[42]Sec. 17.

Federal Employers' Liability Act—"Engaged In Interstate Commerce"—Car Repairer. — Plaintiff was injured while repairing a car belonging to another interstate carrier. It was urged that because the car must have come from another state and would naturally return there plaintiff was engaged in interstate commerce. The court held, however, that he was not engaged in interstate commerce within the meaning of the Act, basing its decision upon the case of Minneapolis, etc., Co. v. Winters, 242 U. S. 353, where it was held that a workman who was repairing an engine which had been used in hauling trains both in intrastate and interstate commerce, and was so used after the plaintiff's injury, was not engaged in interstate commerce. Central R. Co. of New Jersey v. Paslick, 239 Fed. 713.

Carrier—Delivery of Order Notify Shipment.— A carrier is not liable in damages to the shipper of an order notify shipment because of its delivery of the shipment to the notify party without requiring surrender of the original bill of lading, where such party was the true owner of the goods and entitled to their possession. Schaad v. St. Louis I. M. & S. Ry. Co. (Ark.), 193 S. W. 270.

Carriers of Livestock—Burden of Proof.—In an action for damage to a shipment of livestock the plaintiff proved that the stock were shipped in good condition and arrived in damaged condition. The evidence showed that there was no rough handling while the car was being moved, but that the car stood five hours at night on a side track, and there was no evidence to show that the damage had not occurred during such time. Held, that the carrier was not required to disprove that the damage was caused by its negligence while the car stood on the side track, and judgment should be in favor of the carrier. Illinois C. R. Co. v. Atkinson (Miss.), 74 So. 616.

Carriers—Notice of Claim.—A stipulation in a bill of lading for an interstate shipment of peaches that claims for loss or damage must be reported by the consignee to the delivering carrier within 36 hours after he has been notified of the arrival of the freight, otherwise the carriers will not be liable, is valid, and the consignee is not excused from compliance therewith because of the fact that the superintendent of the delivering carrier's dock at which shipment was delivered, and longshoremen employed by such carrier had knowledge of the damaged condition of the goods. St. Louis, I. M. & S. Ry. Co. v. Starbird, decided by U. S. Sup. Ct., April 30, 1917.

Carriers of Goods—Exemptions from Liability For Strikes, Congestion, Etc.—Burden of Proof—Measure of Damages.—Where in an action for damages caused by delay to interstate shipment of melons the defendant railroad company set up in defense certain provisions of the bills of lading exempting the carriers from liability for delay caused by strikes, congestion of traffic or other cause beyond the control of the carrier, and proved the existence of such strike or congestion; the court apparently upholds the carrier's contention that the burden of proof is on the plaintiff to show negligence on the part of the carrier under the circumstances; but evidence that the melons were received for shipment after the strike was over, and that peach shipments were given preference over melon shipments is sufficient to go to the jury on the question of negligence. Penna. R. Co. v Olivit Bros., decided by U. S. Sup. Ct., April 30, 1917.

Railroads—Crossing Accident Duty of Passenger in Automoble to Look For Trains.—A wife, seated in the front seat of an automobile beside her husband who was driving it, and with equal knowledge of the approach to the crossing and the danger thereof, was under the same duty of lookout and discovery as he was. Beemer v. Chicago, R. I. & P. Ry. Co., (Iowa), 162 N. W. 43.

Railroads — Crossing Accident — Contributory Negligence of Automobile Driver.—An automobile driver is guilty of negligence as a matter of law in driving upon a railroad crossing where a view from 90 feet away could be had for 800 feet, increasing to an indefinite distance when 40 feet from the track, despite his testimony that he looked and listened in vain. Beemer v. Chicago, R. I. & P. Ry. Co., (Iowa), 162 N. W. 43.

Railroads— Crossing Accidents — Contributory Negligence.—Where a person attempts to drive an automobile over a railroad crossing in front of a fast speeding train, which he could have seen approaching for a distance of a quarter of a mile; and the crossing grade is muddy, steep and slippery, and has a depression of three inches between the rails, whereby his engine loses power and stops in the depression between the rails, and the train is then so near that it cannot be stopped in time to avoid a collision, such person is guilty of contributory negligence, which bars his recovery for damages notwithstanding the negligence of the railway company in maintaining the defective crossing. Bunton v. Atchison, T. & S. F. Ry. Co. (Kan.), 163 Pac. 801.

Carriers—Theatrical Baggage—Personal Effects.—Plaintiff as manager for the "Broadway Jones Company" contracted with the defendant for two baggage cars for the transportation of the stage furnishings, etc., of the company from New York to Boston. It was agreed that no restriction was imposed upon what might be loaded into the cars except that the load should consist of effects used in theatrical production, that the theatrical company should assign a man to safeguard the effects while in the car, and a release was signed relieving the railroad company from liability for loss, injury or delay, whether caused by its negligence or not. The plaintiff loaded into one of the cars a trunk containing $1,800 worth of his personal effects not intended for use in the theatrical production. Upon arrival at Boston this trunk was found to have been broken open and the contents removed, and plaintiff brought this action to recover the value of the lost goods: Held, that he could not recover, because, first: neither the common law nor statutes require railroads to make such special arrangements for handling theatrical baggage, hence as to such movements it is not a common carrier and can contract against liability even for negligence; second: the plaintiff was not entitled to ship his personal effects in the car, and in doing so was guilty of a fraud against the carrier which precluded him from recovering. This result was held not to be affected by the fact that plaintiff had a ticket for his own transportation entitling him to carry personal baggage not exceeding $100 in value without extra charge. McKeon v. New York, N. H. & H. R. R. Co., 164 N. Y. Supp. 312.

Carriers—Injuries to Passenger at Depot—Contributory Negligence.—A passenger at a depot, who without looking rushes through a partly open door into a dark hallway leading to basement in depot, thinking it a door to toilet, and falls down the stairs and is injured, is guilty of contributory negligence as a matter of law. Illinois Central R. Co. v. Sanderson, (Ky.), 192 S. W. 869.

Master and Servant—Unloading Cars—Assumption of Risk.—A railroad carpenter who was sent into car by foreman to get a sack of cement, assumed the risk of stumbling over a pair of scales on the floor; he being in a better position to know conditions than master. Rush v. Southern Ry. Co. (Ga.), 91 S. E. 898.

INTERSTATE COMMERCE COMMISSION DECISIONS.

RECONSIGNMENT

Where reconsignment rule provides certain period within which reconsignment may be effected at the through rate to final destination, and order to reconsign is not made until after expiration of such period, sum of locals to and from reconsigning point, (point to which originally consigned) should be charged. Oakdale Coal Co. v. Denver & R. G. R. R. Co., 42 I. C. C. 153.

MISROUTING

Shipment was destined to point having no agent, and which was shown in the tariff as a prepay station. Full charges were not collected and the shipment was carried to next station beyond, which had an agent, and a return charge of $15 to destination was demanded. HELD, that if, without notifying the initial line to collect the full prepay charges, or requesting instructions, the connecting carrier assumed the responsibility of forwarding the shipment to the station beyond the named destination, it must accept the resulting liability for increased charges. Although there may also have been an error by the initial line in routing, failure of the connecting line to pursue the course indicated was the proximate cause of the excess charge. Young v. Pittsburgh, C. C. & St. L. Ry., 42 I. C. C. 183.

ERRONEOUS ADVICE OF AGENT

Defendant's agent instructed complainant to load shipments in a certain way. By following such instructions complainant incurred ferry car charges which would not have been incurred had correct instructions been given. HELD, the Act to Regulate Commerce charges carriers and shippers with knowledge of the provisions of tariffs, and the Commission is without authority to award reparation solely upon a showing that erroneous advice as to loading methods was given by defendant's agent. Merriam, Hall & Co. v. Boston & M. R. R. Co., 42 I. C. C. 435.

ERROR IN PUBLISHING RATES DOES NOT JUSTIFY DEPARTURE FROM TARIFFS

It was testified that certain rates which were in effect were the result of error in publication; that the carriers desired to make changes in some rates on lumber and in making up the tariff it became necessary to change the positions of some of the stations, and certain ones were erroneously placed in the wrong column. Despite this, and the fact that other features of the tariff indicated clearly that the rates were erroneously published, HELD, that the inaccuracy could not and did not render the rates unlawful, since the tariff was properly filed, in view of the Commission's repeated rulings that proof of error in the publication of rates does not justify a departure from the published rates. The fact that shippers may have full knowledge that the rates were published in error cannot alter the plain terms of the law. Lamb-Fish Lbr. Co. v. Yazoo & M. V. R. R. Co., 42 I. C. C. 470.

STORAGE — MEANING OF THE WORD "DUMPED"

Consignee refused to accept shipment of roll scales. Defendant, failing to get instructions as to desired disposition, finally notified shipper that the scales would be "dumped" unless such instructions were received within 48 hours. Complainant interpreted the word "dumped" to mean that the material would be thrown away or wasted, after which no further charges would accrue, and gave no orders as to disposition. Accordingly, shipment was dumped, no protection afforded, and the scales exposed for several months, after which they were advertised and sold. Inasmuch as the proceeds did not pay the freight charges, defendant filed suit for its charges, including storage. Complainant was willing to pay all but the storage, claiming that the material was not stored, but was dumped and wasted and no storage charges in fact accrued. Defendant represented that the word "dumped" in railroad parlance means to store at owner's risk and expense. It was willing, however, to waive the storage charges. HELD: Notice given by defendant to shipper was so indefinite and ambiguous as to justify complainant in assuming that the shipments would be wasted or thrown away, and that the complainant's acquiescence in the proposed disposition of the property was based upon this interpretation of the notice, and therefore storage of the material and assessment of charges were unauthorized. Sharon Steel & Hoop Co. v. Penna. R. R. Co., 42 I. C. C. 495.

Carriers—Destination Changed in Transit—Liability of Initial Carrier—Measure of Damages.— Shipments of dressed poultry were delivered to defendant (plaintiff in error), at Temple, Texas, consigned to St. Louis, Mo., with directions to reice at all regular icing stations. After the forwarding of the shipments the shippers directed the defendant's agent at Temple to divert the cars from St. Louis to Chicago. which was done, the cars moving from St. Louis to Chicago via the Wabash, no new bills of lading being issued. The poultry reached Chicago in a deteriorated condition which was found to be due to the failure to re-ice the car at a regular icing station en route to St. Louis. Held: That the evidence justified the holding that the bills of lading to St. Louis were continued in force, the destination being by agreement changed to Chicago; that said bills of lading covered the entire movement, and that the defendant was responsible therefor under the Carmack Amendment. It was further held that the measure of damages was controlled by the provision of the bill of lading to the effect that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges if prepaid), at the place and time of shipment"; that plaintiff (consignee) was entitled to the difference between the invoice price to it and the proceeds of sale of the deteriorated poultry at Chicago. The court remarked that no question was raised as to the right of the plaintiff to recover also the freight paid. Gulf, &c., Ry. Co. v. Texas Packing Co., decided by U. S. Sup. Ct., May 7, 1917.

Carriers By Water—War—Abandonment of Voyage.—This was an action against the steamship company for breach of contract to carry certain shipments of gold to Plymouth and Cherbourg.

The Kronprinzessin Cecilie was a German steamship owned by the claimant, a German corporation. On July 27, 1914, she received the gold in New York for the above destinations, giving bills of lading in American form, referring to the Harter Act, and, we assume, governed by our law in respect of the justification set up. Early on July 28 she sailed for Bremerhaven, Germany, via the mentioned ports, having on board 1892 persons, of whom 667 were Germans, passengers and crew; 406, Austrians; 151, Russians; 8, Bulgars; 7, Serbs; 1, Roumanian; 14, English; 7, French; 304, Americans; and two or three from Italy, Belgium, Holland, &c. She continued on her voyage until about 11.05 P. M., Greenwich time, July 31, when she turned back; being then in 46° 46′ N. latitude and 30° 21′ W. longitude from Greenwich and distant from Plymouth about 1070 nautical miles. At that moment the master knew that war had been declared by Austria against Servia (July 28), that Germany had declined a proposal by Sir Edward Grey for a conference of Ambassadors in London; that orders had been issued for the German fleet to concentrate in home waters; that British battle squadrons were ready for service; that Germany had sent an ultimatum to Russia, and that business was practically suspended on the London Stock Exchange. He had proceeded about as far as he could with coal enough to return if that should prove needful and was of opinion that the proper course was to turn back. He reached Bar Harbor, Maine, on August 4, avoiding New York on account of supposed danger from British cruisers, and returned the gold to the parties entitled to the same.

On July 31 the German Emperor declared a state of war, and the directors of the company at Bremen, knowing that that had been or forthwith would be declared, sent a wireless message to the master: "War has broken out with England, France and Russia. Return to New York." Thereupon he turned back. The probability was that the steamship, if not interfered with or prevented by accident or unfavorable weather, would have reached Plymouth between 11 P. M. August 2, and 1 A. M. August 3, and would have delivered the gold destined for England to be forwarded to London by 6 A. M., August 3. On August first at 9.40 P. M., before the earliest moment for probably reaching Plymouth, had the voyage kept on, the master received a wireless message from the German Imperial Marine Office: "Threatening danger of war. Touch at no port [of] England, France, Russia." On the same day Germany declared war on Russia. On August 2, Germany demanded of Belgium passage for German troops, and seized two English vessels with their cargoes. Explanations were offered of the seizures, but the vessels were detained. The German Army entered Luxembourg, and there were skirmishes with French troops. On August 3 Germany was at war with France, and at 11 P. M., on August 4, with England. On August 4 some German vessels were detained by England, and early on the fifth were seized as prize, e. g., Prinz Adalbert [1916] P. 81. No general history of the times is necessary. It is enough to add that from the moment Austria declared war on Servia the great danger of a general war was known to all.

The court held that the steamship company was not bound to attempt to deliver the gold at the risk of capture and that the master was justified under the circumstances in turning back. A shipowner is not required to wait until war is actually declared before giving up his voyage, reasonable ground for anticipating war and the consequent danger of capture being sufficient justification for so doing. If he uses sound judgment under the circumstances, he is not to be put in the wrong by nice calculations that if all went well he might have delivered the gold and escaped capture by a few hours. North German Lloyd, Claimant of the Steamship "Kronprinzessin Cecilie" v. Guaranty Trust Co., decided by U. S. Sup. Ct., May 7, 1917.

Federal Employers' Liability Act—Storing Rail.—An employee of an interstate carrier who is injured while storing rail in a pit for future use is not engaged in interstate commerce as the use of the rail in such commerce was not imminent and might never occur. Hudson & M. R. Co. v. Ioria, 239 Fed. 855.

Passengers—Getting Off Train—Place of Alighting.—The plaintiff was a passenger injured alighting from a train. Her declaration alleged that at a street intersection in the city of her destination the train was brought to a standstill, she proceeded to alight, and while so engaged the railway company negligently ran the train forward and she was thrown to the ground. Sustaining a demurrer to this declaration, the court observed that:

> "It is not alleged that the place at which the train stopped was a station or a depot or that passengers customarily or habitually alighted there or that the defendant's servants knew or should have known that the plaintiff contemplated alighting or was proceeding to alight at the place where the train stopped * * *. This being so, and the necessary inference from the specific allegations being that the train was not at a station or depot or a customary or habitual alighting place when 'said train was brought to a standstill,' the defendant was not charged with any knowledge or notice that the plaintiff intended to alight so as to raise a duty to see that she had ample opportunity to alight safely."

Judgment for defendant affirmed. Barnwell v. Seaboard Air Line Ry. (Fla.), 74 So. 497.

Carriers of Livestock—Notice of Claim—Waiver.—A stipulation in a contract for the interstate carriage of live stock requiring that notice of claim for loss or injury to the stock be given in writing to the carrier's agent before the stock are removed or mingled with other stock as a condition precedent to any liability on the part of the carrier is valid and cannot be waived. Atchison, T. & S. F. Ry. Co. v. Miller (Col.), 163 Pac. 836.

Persons On or Near Tracks—Approach Along Tracks to Station—Use by Public.—Schneider was walking along the right of way from an intersecting street to the railroad passenger station when he fell into an open ditch dug to put in a drain. On the other side of the tracks was a prepared passway for the public to approach the station. Whether the public habitually used the side of the track on which Schneider was walking was in dispute. The court drew a distinction between the duty of anticipatory care to guard persons who might be expected on the tracks from the hazard of train operation and the duty to keep the right of way safe for pedestrians other than those invited to approach its stations, and said:

> "It is only to maintain a lookout, to avoid injury in the operation of its trains, that the railroad owes a duty to the public using its right of way as trespassers or licensees, and members of the public are trespassers or licensees, when upon the company's right of way, except at public crossings and public thoroughfares, or upon such places as the company has expressly or impliedly invited the public."

Judgment for plaintiff reversed. Louisville & Nashville R. Co. v. Schneider (Ky.), 192 S. W. 834.

Federal Employers' Liability Act—Employed in Interstate Commerce.—In an action for damages under the Federal Employers' Liability act, the evidence showed that the plaintiff, a track man, after quitting work sought shelter behind a box car in order to watch his children safely across the tracks, and while standing there was injured by another car with defective brakes, which was propelled by the wind against the car behind which the plaintiff was standing. The Texas Court of Civil Appeals held that peremptory instruction for the defendant was proper, the employee being engaged in a personal undertaking in the performance of which the master owed him no duty. Even though the plaintiff might have been licensed to pass to and fro across the tracks at the point where he was injured, this would not constitute a license to stop and loiter on the track at that point in the lee of a car. Perez v. Atchison, T. & S. F. R. Co. (Tex.), 192 S. W. 274.

"Dangerous Attraction" Case.—Action was brought for injury to a young boy by the falling of some of the ties in a pile on a right of way near a highway, while he and another boy were climbing up and down the pile. The railroad knew that the boys of the neighborhood were accustomed to play on the ties, and that they were attractive to them. It also knew that for weeks and months other boys had climbed and played on the pile without causing any of the ties to fall. The ties were peeled, hewn on both sides, and piled eight high in rows, as close together as possible. There was no evidence that it was necessary or customary to brace ties so piled. The pile, made by the seller of the ties, was at the appropriate place for the use of the ties by the company. The Circuit Court of Appeals, Ninth Circuit, held that this evidence was insufficient to fix any liability on the railroad company. Great Northern R. Co. v. Willard, 238 Fed. 714.

Terminal Employees Not Under Hours of Service Act.—The Circuit Court of Appeals, Second Circuit, holds that a terminal carrier, receiving and delivering goods only from or to common carriers by railroad or steamship with whom it had contracts, and dealings with the shippers and consignees only as agents for such carriers, is not a "common carrier" within the hours of service act. The terminal company is therefore not liable under the act for permitting its employees to work more than 16 hours in one day, though it would be liable if it used the crews of the carriers in its operations and permitted them to work overtime. Brooklyn Eastern Dist. Terminal v. United States, 239 Fed. 287.

Unexplained Accident to Brakeman.—A brakeman while walking between two tracks to reach the cars on which he was working was passed by another train and struck and injured by some object which he thought felt like iron. In an action against the company there was no evidence that anything projected from the passing train, although it was contended that firemen frequently allowed fire hooks to extend over the side, and that under the doctrine of res ipsa loquitur the burden of explaining the injury was on the defendant. The Circuit Court of Appeals, Second Circuit, held that as the presumption which the jury may make cannot serve as the foundation for another presumption, and as trains frequently catch and throw heavy objects which may injure persons in proximity, the plaintiff's showing was not enough to take the case to the jury. Smith v. Pennsylvania R. Co., 239 Fed. 103.

Hours of Service Act—Yardmasters.—In an action for a penalty under the hours of service act, the question was whether the yardmasters whose number of hours of service exceeds that of "operators and train despatchers," should be limited to a like number. The company's rules gave a yardmaster charge of the movement of trains within the part of the yard limits assigned to him. Freight conductors were required to obey his orders. He was furnished by the railroad with a telephone to use in performing his duties. The Federal District Court for the Eastern district of Pennsylvania held that the yardmaster was within the provisions of the act limiting the time of continuous service of any operator, train despatcher, or other employee who by the use of telephone delivers orders pertaining to train movements. United States v. Pennsylvania R. Co., 239 Fed. 576.

Carriers—Offsetting Damages to Shipment Against Unpaid Freight Charges.—In a suit in equity by a shipper to restrain the defendant railroad (a connecting line) from prosecuting its action against the shipper for unpaid freight charges and to recover for damages to the shipment caused by delay no showing being made that the delay was on the defendant's line, it was held that the suit would not lie, since the initial carrier only is made liable for damages by the Carmack Amendment regardless of where it occurred, and since freight charges must be paid in cash, their collection cannot be defeated by such claim of offset. Johnson-Brown Co. v. Del. L. & W. R. Co. (Ga.), 239 Fed. 590.

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THE MEMORANDUM

Vol. II No. 11

LAW DEPARTMENT JUNE, 1917. SOUTHERN RAILWAY COMPANY

THE REED "BONE-DRY" AMENDMENT.*

The so-called "Bone-dry" Amendment to the Post Office Appropriations Act, approved March 3, 1917, orginated in an amendment offered by Senator Reed[1] to an amendment proposed by Senator Jones[2] excluding from the mails in certain cases advertisements of, and solicitations for orders for, "spirituous, vinous, malted, fermented, or other intoxicating liquors of any kind."

The effective date of the Jones Amendment as amended by the Reed Amendment (Section 5 of the Act) was, by Joint Resolution of March 4, 1917, postponed to July 1, 1917.

The Reed amendment provides:

> "Whoever shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, except for scientific, sacramental, medicinal and mechanical purposes into any State or Territory, the laws of which State or Territory prohibit the manufacture or sale therein of intoxicating liquors for beverage purposes, shall be punished as aforesaid: Provided, that nothing herein shall authorize the shipment of liquor into any State contrary to the laws of such State."

Prior to the passage of federal legislation upon the subject, the States were hampered in their attempts to control the liquor traffic by the principle that the silence of Congress indicated its will that the interstate transportation of intoxicating liquor should not be regulated by the States and that, therefore, the States could not prevent its importation, sale or disposition before it had lost its interstate character, i. e., while in the original package.[3]

In 1890, Congress enacted the Wilson Act,[4] which removed the disability of the States in so far as the sale or disposal within a State of imported liquor after delivery therein was concerned, but did not so operate as to permit the States to prevent the importation of liquor and its delivery to the consignee.[5]

The States were not yet in a position to control the liquor traffic, despite their power to prevent sale or disposal, even in the original package, after delivery, because of their inability to prevent importation and delivery to the consignee. To meet this situation, Congress passed the so-called Webb-Kenyon Act,[6] which prohibits the interstate transportation of intoxicating liquor when it is intended to be "received, possessed, sold, or in any manner used" in violation of the law of a State. This Act, which was upheld by the United States Supreme Court in James Clark Distilling Co. v. Western Maryland Ry. Co.,[7] has given the States full control of the subject-matter, and enabled them to entirely exclude intoxicating liquor by forbidding its receipt, possession, sale, or use.

The Reed Amendment represents a reversal of the former policy of Congress, in that it operates not as a permission to the States but, in the cases to which it applies, as a restriction upon the States. Congress, thereby, through the medium of its power over interstate commerce, enters into the field of the exercise of police power within the States. If a State forbids the manufacture or sale of intoxicating liquor for beverage purposes, although it permits its importation and receipt for personal use or otherwise, Congress steps in and entirely forbids the importation into such State, except for scientific, sacramental, medicinal and mechanical purposes, thus setting aside the State law so far as importation is thereby permitted.

The provision is not happily expressed. It penalizes any one who "shall order, purchase, or cause intoxicating liquors to be transported in interstate commerce, into any State," etc. The words "order" and "purchase" do not fit into the grammatical construction of the sentence. Let us, however, pass on to more substantial difficulties.

For the the sake of brevity and convenience in the subsequent discussion, let us paraphrase the language of the provision and treat it as if it read:

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* Reprinted, by permission, from Virginia Law Review, May, 1917.

[1] Congressional Record, 64th Congress, 2nd session, pp. 3758, 3762.

[2] Congressional Record, 64th Congress, 2nd session, p. 3747.

[3] Bowman v. Chicago, etc., Ry. Co., 125 U. S. 465 (1888); Leisy v. Hardin, 135 U. S. 100 (1890).

[4] Act of August 8, 1890, 26 Stat. L. 313, U. S. Comp. '16, § 8738.

[5] American Express Co. v. Iowa, 196 U. S. 133 (1905).

[6] Act of March 1, 1913, 37 Stat. L. 699, U. S. Comp. '16, § 8739.

[7] 242 U. S. 311 (January 8, 1917). [See discussion of this decision by Prof. Lindsay Rogers, 4 Va. Law Rev. 558.]

"It shall be unlawful (except for scientific, etc., purposes) to import intoxicating liquors into a State the laws of which prohibit the sale of intoxicating liquors."

The question arises as to the proper construction of the Act in a case where a State prohibits the sale of intoxicating liquor for beverage purposes in certain places and permits it in others (e. g., under a local option law, where prohibition or permission depends upon the result of a local balloting). In such a case does the federal act permit the importation of liquor into the "dry" territory of such State? The prohibition is against transportation into any State the laws of which forbid sale therein. The offense described is not the importation into a given place in the State but the importation (across the line) into the State. The States to which the provision applies are those which forbid the sale therein. Neither the letter nor the spirit of the clause justifies an interpretation which would altogether exclude intoxicating liquors from a State which forbids the manufacture or sale thereof only at some place or places therein. Such an interpretation would exclude liquor from a "wet" State if it should, for example, forbid the sale of liquor within a certain distance of a school house. The Act deals with entire States and not with parts of States. Unless prohibition of sale is statewide, the Act does not apply.

The prohibition is against importing into certain States "intoxicating liquors." What are intoxicating liquors? State statutes prohibiting the sale of intoxicating liquors define the term (for the purposes of such statutes) in varying ways. Frequently it is provided that liquors containing a given percentage of alcohol shall be deemed intoxicating liquors. As the phrase is not defined in the Reed Amendment, what shall it be deemed to include? A definite percentage of alcohol cannot be adopted as the test; for the capacity of a liquor to produce intoxication will depend upon the nature of other ingredients.[8] In the absence of statutory definition, the question whether a given fluid is intoxicating liquor can only be answered by determination whether it will produce intoxication, and that is a question of fact to be ascertained upon evidence, unless the liquid be such (e. g., whiskey) that the court will take judicial notice that it is intoxicating.[9]

The same term is used in the Act in another place. The States as to which the prohibition is applicable are those which prohibit the sale (for beverage purposes) of "intoxicating liquors." Does the term mean the same thing here as when first used? How are we to determine which are the States which prohibit the sale of intoxicating liquors? Suppose that a State should prohibit the sale of absinthe and permit the sale of all other intoxicating liquors. Is such a State one that prohibits the sale of intoxicating liquors for beverage purposes? To so construe the Act would not be in accordance with the presumed intent of Congress. Such a State would not be considered a "dry" or "prohibition" State. Reverse the case and suppose that the State should permit the sale of one kind of intoxicating liquors and prohibit the sale of all other kinds. Would the result be different? Take the law of North Carolina as an example. A statute of that State[10] altogether prohibits the manufacture and sale of intoxicating liquors, except that it permits the manufacture and sale of wine if sold at the place of manufacture in packages of not less than two and one-half gallons. Is North Carolina[11] a State the laws of which "prohibit the manufacture or sale therein of intoxicating liquor for beverage purposes"?

The Act forbids the importation of intoxicating liquors into States falling within a certain description. The natural meaning of the language is that it prohibits the importation of all intoxicating liquors into such States. Is it possible to construe it to mean that if a State prohibits the sale of absinthe and permits the sale of all other intoxicants the federal act forbids the importation of absinthe only—in other words, is it possible to construe the Act as prohibiting the importation of some (but not all) intoxicating liquors into a State that prohibits the sale of such (but not all) intoxicating liquors? Such a construction does violence to the language of the provision. There would seem to be no justification for interpreting a prohibition against the importation into certain described States of intoxicating liquors as prohibiting the importation of certain kinds only of intoxicating liquors. Clearly the Act divides the States into two classes, (1) those that prohibit the sale of intoxicating liquors, and (2) those that permit it. Nor will the language of the provision bear the interpretation that the importation of all intoxicating liquor into States forbidding the sale of some intoxicating liquor is forbidden. The prohibition is applicable only to States which prohibit the sale of all intoxicating liquors. If a State be not entirely "dry" from a sales standpoint, it is not rendered "bone-dry" by the Reed provision.

The illustration taken from the North Carolina law is one where the State permits the sale of liquor (wine), which is admittedly intoxicating liquor not only in fact but under the terms of the State statute. For the purpose of further illustration, let us suppose that the State statute forbids the sale of "ardent spirits" or "alcoholic liquors" and defiines the term used as liquors

[8] In Geer Drug Co. v. Atlantic, etc., R. Co., 104 S. C. 207, 88 S. E. 448 (1916), the court held that the Pabst "Best Tonic," a product containing some five per cent. of alcohol, was not an intoxicating liquor, the record showing that "it would be impossible for any person to become intoxicated by its immoderate use for the reason that said person would become sick long before he became intoxicated."

[9] Cihak v. United States, 232 Fed. 551 (1916). In Thomas v. Commonwealth, 90 Va. 92, 17 S. E. 788 (1893), the court took judicial notice that apple brandy is intoxicating. For definitions of the phrase "intoxicating liquor," see 4 Words & Phrases 3736; 2 Words & Phrases, 2d series, 1176.

[10] Acts 1908, Ch. 71.

[11] North Carolina was used by Senator Reed as an example of the class of states into which the importation of intoxicating liquor was to be forbidden by his amendment. Congressional Record, 64th Congress, 2nd session, p. 3753.

containing six per cent. or more of alcohol. Let us also make the assumption that liquor containing five per cent. or more of alcohol is in fact intoxicating. In such a case the State does not prohibit the sale of all intoxicating liquor; since it permits the sale of intoxicating liquor containing from five to six per cent. of alcohol. If the views above suggested are correct, such a State is not one the importation of intoxicating liquor into which is forbidden by the Reed provision, regardless of of whether the intoxicating liquor sought to be introduced into the State is such that its sale is forbidden by the laws of the State. Suppose, however, that the State statute in terms prohibits the sale of "intoxicating liquors" but defines the term as liquors containing more than six per cent. of alcohol (liquor containing five per cent. or more of alcohol being still assumed to be in fact intoxicating). Is the case different from that last above suggested? Is the applicability of the federal act to depend upon the mere question of the terms used in the State statute regardless of the real character of the thing prohibited to be sold? Can it be correctly concluded that if the State statute does not use the term "intoxicating liquors" in its prohibition against sale we must ascertain whether all liquors which are in fact intoxicating are forbidden to be sold, but that if the State statute in terms forbids the sale of "intoxicating liquors" it is immaterial whether in fact the State has prohibited the sale of all liquors actually intoxicating? Consider the reverse case, taking, as an illustration, the Mapp Law of Vinginia,[12] which prohibits the manufacture, sale, etc., of ardent spirits. Section one provides:

> "The words ardent spirits, as used in this act, shall be construed to embrace alcohol, brandy, whiskey, rum, gin, wine, porter, ale, beer, all malt liquors, absinthe and all compounds or mixtures of any of them; all compounds or mixtures of any of them with any vegetable or other substance; and also, all liquids, mixtures or preparations, whether patented or otherwise, which will produce intoxication; fruits preserved in ardent spirits, and all beverages containing more than one-half of one per centum of alcohol by volume, except as hereinafter provided."

It is clear that Virginia has prohibited the sale for beverage purposes of all intoxicating liquors. It is equally true that it has gone further and prohibited the sale of liquors which are not intoxicating. Virginia is one of the class of States to which the Reed Amendment applies, and therefore the importation therein of intoxicating liquors is thereby prohibited. It can hardly be contended, however, that all things falling within the definition placed upon "ardent spirits" in the Virginia statute are prohibited by the Reed Amendment to be imported into Virginia. A large class of liquors prohibited to be sold in Virginia are not in fact intoxicating liquors and are not so denominated by the Virginia law. But if we substitute the term "intoxicating liquors" for "ardent spirits" in the Virginia statute the legal situation would not seem to be affected. It is not to be supposed that Congress in enacting an act excluding intoxicating liquors from the State under certain circumstances, intended that harmless articles should be excluded from the channels of interstate commerce, so far as importation into a State is concerned, merely because they should be covered by the terms of the State prohibition statute, even though they should fall within a class denominated by such statute "intoxicating liquors."

The prohibition statute of West Virginia[13] prohibits the manufacture and sale of "liquors" and defines that term as including, among other things, "all malt or brewed drinks, whether intoxicating or not". How else can the applicability of the prohibition of importation in the federal act as to "malt or brewed drinks" be tested other than by ascertaining whether or not they are actually intoxicating? And, if this be true, the same test is to be applied, even though the liquor in question be denominated an intoxicating liquor in the State prohibition law.

The Georgia law[14] forbids the sale of "Prohibited Liquors and Beverages," and defines that term as including, among other things, "all liquors and beverages or drinks made in imitation of or intended as a substitute for beer, ale, wine or whiskey, or other alcoholic or spirituous, vinous, or malt liquors, including those liquors and beverages commonly known and called near-beer." Surely it cannot be contended that the federal act prohibits the importation into Georgia of a non-intoxicating liquid merely because it is made in imitation of or intended as a substitute for, the liquors named in the statute and thereby falls within the terms of the State prohibition? What compass is there to steer by in construing the federal prohibition in respect to the importation of intoxicating liquors other than the test of whether they are actually intoxicating?

If the terms of state statutes are not controlling in determining what liquors are prohibited from being imported into a State which forbids the sale of all intoxicating liquors, it would seem that the terms of state statutes are not controlling in determining whether the State in question prohibits the sale of all intoxicating liquors.

In this connection it is interesting to note the language of the Webb-Kenyon Act. It is entitled, "An act divesting intoxicating liquors of their interstate character in certain cases," and provides (omitting words that are not interesting here) that, "The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State * * * into any other State * * * which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State * * * is hereby prohibited." This Act and the Reed Amendment are to be considered **in pari materia**, in so far as the point under discussion is concerned. While the purpose of the for-

[12] Acts of Virginia, 1916, Ch. 146, p. 216.

[13] Acts of 1913, Ch. 13.

[14] Acts of 1915, p. 77.

mer is to subject the importation of the liquors described to the control of the States and of the latter to divest the States of control over the importation of liquors in certain instances, yet in each the applicability of the federal prohibition is determined by the state law and the method of dealing with the subject-matter is similar. The language of the Webb-Kenyon Act seems clearly to confine the prohibition to articles actually falling within the description as a matter of fact, or, to express it differently, as a matter of federal law, and to exclude any contention that the applicability of the federal prohibition is dependent to any degree upon the description in the state laws of liquors, the receipt, possession, sale or use of which is made unlawful.[15]

The language of the Wilson Act is also of interest. That Act provides that, "All fermented, distilled, or other intoxicating liquors or liquids transported into any State * * * shall upon arrival in such State * * * be subject to the operation and effect of the laws of such State," etc. Evidently the State is here given control with respect only to the liquors in fact falling within the description in the federal act, and cannot, by virtue of the federal act, undertake to prevent the sale of articles not falling within that description by denominating them "fermented, distilled or other intoxicating liquors."

Attention is called to the exception contained in the Reed Amendment, **"except for scientific, sacramental, medicinal, and mechanical purposes."** The prohibition against sale contained in the state law may forbid sale for scientific, etc., purposes as well as for beverage purposes. Nevertheless, it is clear that the importation into a State of intoxicating liquors for scientific purposes is not a violation of the federal act. This indicates that it was not the purpose of Congress to make the applicability of its prohibitions coincident with the prohibitions contained in the State anti-sale laws.

It would seem that there is no way to escape the conclusion that the operation of the Reed Amendment is confined to prohibiting the importation (except for scientific, sacramental, medicinal and mechanical purposes) of all liquors in fact intoxicating into any State which prohibits the manufacture or sale for beverage purposes of all liquors in fact intoxicating.

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[15] If the views expressed in this article are correct, some of the States have undertaken to exclude liquids which are not covered by the Webb-Kenyon Act, and which are, therefore, not subject to state control when moving in interstate commerce.

Railroads—Duty Owed to Trespassers on Track.—A railroad company owes no duty to exercise active vigilance to provide against injuries to trespassers on its tracks until their presence is known, but must exercise reasonable care to avoid injuring them after discovering their peril. The fact that the trespasser is a child does not change the degree of care to be exercised by the railroad. McCarthy v. New York, N. H. & H. R. Co., 240 Fed. 602.

Master and Servant—Safe Place—Dismantling Buildings.—A master employing a servant to dismantle an old roof is under no obligation to furnish a safe place to work.

> "It is manifest that, in the destruction of a building, there is not an attempt or obligation to make it, or any part thereof, secure; on the contrary, the work of removal is one in which, in turn, each part of the structure is rendered insecure. This every workman understands."

Handley v. Carnegie Steel Co. (Pa.), 100 Atl. 543.

Federal Employers' Liability Act—Interstate Employee's Rights Governed by Federal Act and Not By State Workmen's Compensation Act.—While in the service of a railroad company in the State of New York, defendant in error sustained a personal injury whereby he lost the use of an eye. At that time the railroad company was engaging in interstate commerce as a common carrier and defendant in error was employed by it in such commerce. The injury was not due to any negligence of the carrier or any of its officials, agents, or employees, but arose out of the ordinary risk of the work in which he was engaged. He was a section laborer assisting in the repair of carrier's main track, and while taping ties, struck a pebble, which rebounded and hit his eye. Following the injury he sought compensation therefor from the carrier under the Workmen's Compensation Act, and an award was made to him by the state Commission. The carrier insisted that its liability and the employee's rights were governed exclusively by the Federal Employers' Liability Act. The United States Supreme Court so held, declaring that the federal act was intended to cover the whole field and could not be pieced out by state regulations. New York Central Railroad v. Winfield, decided by U. S. Supreme Court, May 21, 1917.

Federal Employers' Liability Act—"Interstate Commerce"—Surveying Track.—A section man working under a road engineer, who was surveying and setting stakes with a view of improving a curve by a slight change in the track, was run down and killed while making his way to a designated point to hold a rod, by means of which he intended to take a back sight. The road engineer completed the work by placing stakes to guide the trackmen in changing the rails, but the change in the track was never made. Held, that the plaintiff's intestate was engaged in interstate commerce within the meaning of the Federal Employers' Liability Act. Southern Railway Co. v McGuin, 240 Fed. 649.

Injury to Railroad Employee—Violation of Rules.—A railroad company's rule for use of signals by employees held to apply to a car inspector, who goes beneath a car without displaying signal required by the rule, so as to preclude him from recovering for injuries due to movement of the car. Abshier v. Louisiana Ry. & Nav. Co., (La.), 74 So. 901.

GEORGIA STATUTE REQUIRING CHECKING OF SPEED AT CROSSINGS HELD UNCONSTITUTIONAL.

The case of Seaboard Air Line R. Co. v. Blackwell, involving the constitutionality of the so-called "checking" statute of Georgia, was decided by the Supreme Court of the United States, June 4, 1917. The opinion is herewith reproduced in full:

SUPREME COURT OF THE UNITED STATES.

No. 213.—October Term, 1916.

Seaboard Air Line Railway Company, Plaintiff in Error, v. Elizabeth Blackwell. In Error to the Court of Appeals of the State of Georgia.

[June 4, 1917.]

Mr. Justice McKenna delivered the opinion of the Court.

This writ of error is directed to a judgment entered upon a verdict for the sum of $1,000 in the city court of Elberton, Georgia, for the death of a son of defendant in error alleged to have been caused by the railway company. The judgment was affirmed by the Court of Appeals of Georgia.

The facts as charged are: That the deceased was driving a horse and buggy along a public road in the county of Elbert and while crossing the railroad track of the railway company at a public crossing outside of the city of Elberton he was struck by the engine of one of the company's passenger trains and received injuries from which he died three days later.

That the employees of the company in charge of the train failed to blow the engine whistle at the blowpost 400 yards south of the crossing, failed to keep blowing it until the train arrived at the crossing, and failed to check the speed of the train at such blowpost and keep it checked until the train reached the crossing, and, so failing, the company was guilty of negligence.

That the employees of the company failed to keep the train under control and approached the crossing at a high and dangerous rate of speed so that they could not stop the same in time to save the life of the deceased, and that such conduct was negligence. And that "such conduct was negligence if they saw said deceased on the crossing, and it was negligence if they did not see him, and it was negligence under the blowpost law,* and it was negligence regardless of the blow-post law."

The company by its answer denied the various acts of negligence charged against it and its employees and denied "that the failure to comply with said blow-post law was negligence on its part relatively to the transaction in question."

The company set out the applicable sections of the law and alleged that its train was running in interstate commerce between the States and especially between Georgia and South Carolina. That between the city of Atlanta, Georgia, and the Savannah River, a distance of 123 miles where the same is the boundary line of Georgia, there are 124 points where the line of the railroad crosses public roads of the different counties of the State, established pursuant to law, and that all of such crossings are at grade.

That in order to comply with the law the speed of a train would have to be so slackened that there would be practically a full stop at each of the road crossings; that the time required for such purpose would depend upon various conditions, which might or might not exist at the time and at the crossings, among others, the state of the weather and the percentage of grade; but it would not be less than three minutes for a train composed of an engine and three cars, and for a train of a greater number of cars the time would be greater—for an average freight train, not less than five minutes.

That the train alleged to have caused the death of the deceased was composed of an engine, a mail car and two coaches, and that if the blow-post law had been complied with on the day in question at least three minutes would have been consumed at each crossing, more than six hours between Atlanta and the Savannah River. That the running time between those points according to the adopted schedule was four hours and thirty minutes. That if the law had been complied with the time consumed between those points would have been more than ten and one-half hours.

That for freight trains the time consumed would be more than sixteen hours, the maximum speed of such trains on the company's road being twenty miles an hour.

That the crossings are the usual and ordinary grade crossings and there are no conditions which make any one of them peculiarly dangerous other than such danger as may result from the crossing of a public road by a railroad track at grade.

That between the City of Atlanta and the Savannah River the line of the company's railroad crosses the tracks of two other railroads and that under the laws of the State a train is required to

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* "Sec. 2675. **A post to be erected.** There must be fixed on the line of said roads and at the distance of four hundred yards from the center of each of such road crossings, and on each side thereof, a post, and the engineer shall be required, whenever he shall arrive at either of said posts, to blow the whistle of the locomotive until it arrives at the public road, and to simultaneously check and keep checking the speed thereof, so as to stop in time should any person or thing be crossing said track on said road.

"Sec. 2676. **Neglecting to erect such posts.** Should any company fail or neglect to put up said posts, the superintendent thereof shall be guilty of a misdemeanor

"Sec. 2677. **Failing to blow whistle.** If any engineer neglects to blow said whistle as required, and to check the speed required, he is guilty of a misdemeanor: Provided, that within the corporate limits of the cities, towns, and villages of this State, the several railroad companies shall not be required to blow the whistle of their locomotives on approaching crossings or public roads in said corporate limits, but in lieu thereof the engineer of said locomotives shall be required to signal the approach of their trains to such crossings and public roads in said corporate limits, by tolling the bell of said locomotive; and on failure to do so, the penalties of this section shall apply to such offense."

come to a full stop fifty feet from the crossing and that the time so consumed would increase the time required to operate between the points referred to.

That the law as applied to the train in question is an unreasonable regulation of interstate commerce and a violation of Paragraph 3, §8, Article I, of the Constitution of the United States, and that therefore the company is not guilty of the various acts of negligence charged against it.

Upon demurrer to the answer of the company the averments in regard to the law were struck out except the denial that the failure to comply with the law was negligence on the company's part "relatively to the transaction in question."

The case so went to the jury, including the defense that the deceased failed to exercise ordinary care and diligence for his own safety. The jury returned a verdict for the sum of $1,000.

A motion for a new trial was denied. The railway company then took the case to the Court of Appeals of the State and that court invoked the instruction of the Supreme Court upon the question whether that part of the law (§2675, Civil Code of the State) which requires the engineer to check the speed of the train on approaching a public crossing, so as to stop in time should any person or thing be crossing the railroad track on its road, is unconstitutional so far as an interstate train is concerned, under the conditions set forth in the answer of the company, for the reason that as thus applied the statute is a regulation of interstate commerce and repugnant to the commerce clause of the Constitution of the United States.

The Supreme Court answered the question in the negative. The opinion of the court is very elaborate, but the basis of it is that the law is a valid exercise of the police power of the State, that there was no displacement of its exercise by congressional action, and that by its exercise in the law in question it did not directly burden interstate commerce.

The Court of Appeals accepted necessarily the views of the Supreme court and sustained the ruling of the trial court upon the demurrer to the plea of the company that the law violated the commerce clause of the Constitution.

To the contention of the company that the deceased had not observed ordinary care for his own safety and could have avoided the injury which resulted in his death, the court answered that it was a jury question, and said: "In view of the evidence as to the defendant's failure to comply with the provisions of the 'blow-post law' there is sufficient testimony as a whole to support the jury's finding in favor of the plaintiff." The court hence affirmed the judgment.

It will be observed, therefore, from this statement that the law of the State was an element in the decisions of the state tribunals and its constitutionality was sustained against the attacks of the railway company. The question is, therefore, presented for our consideration. In its consideration we need not descant upon the extent of the police power of the State and the limitations upon it when it encounters the powers conferred upon the National Government. There is pertinent exposition of these in Southern Railway Co. v. King, 217 U. S. 524, in which the law now under review was passed upon. The case is clear as to the relation of the powers and that the power of the State cannot be exercised to directly burden interstate commerce. It was recognized that there might be crossings the approach to which the State could regulate. But, on the other hand, it was said there might be others so numerous and so near together that to require the slackening of speed would be practically destructive of the successful operation of interstate passenger trains, and, therefore, "statutes which require the speed of such trains to be checked at all crossings so situated might not only be a regulation but also a direct burden upon interstate commerce, and therefore beyond the power of the State to enact."

That case went off on a question of pleading. An answer was filed that did not invoke the Federal Constitution. This was attempted to be done by an amended answer which was very general and to which a demurrer was sustained. At the trial of the action there was an offer of evidence of the specific effect of the law upon the operation of trains as showing the impediment of the law to interstate commerce. The evidence was excluded. This court sustained the ruling on the ground that the evidence was not admissible under the pleadings. The ruling upon the demurrer to the answer was sustained on the ground that the answer contained only general averments constituting "mere conclusions." It was said that the averments "set forth no facts which would make the operation of the statute unconstitutional. They do not show the number or location of the crossings at which the railway company would be required to check the speed of its trains so as to interfere with their successful operation. For aught that appears as allegations of fact in this answer the crossing at which this injury happened may have been so located and of such dangerous character as to make the slackening of trains at that point necessary to the safety of those using the public highway, and a statute making such requirement only a reasonable police regulation, and not an unlawful attempt to regulate or hinder interstate commerce. In the absence of facts setting up a situation showing the unreasonable character of the statute as applied to the defendant under the circumstances, we think the amended answer set up no legal defense, and that the demurrer thereto was properly sustained."

The facts so specified and which it was decided would give illegal operation to the statute are alleged in the present case, and, assuming them to be true—and we must so assume—compel the conclusion that the statute is a direct burden upon interstate commerce, and, being such, is unlawful. The demurrer to the answer averring them was therefore improperly overruled.

We express no opinion on the third defense of the company.

Reversed and case remanded for further proceedings not inconsistent with this opinion.

The Chief Justice, Mr. Justice Pitney and Mr. Justice Brandeis dissent on the ground that the regulation in question was within the class which the State is entitled to enact in the absence of congressional action, and until such action. There having been no action by Congress, there is therefore no ground for holding the state action void as a regulation of interstate commerce.

THE CAR SERVICE ACT.

[Public—No. 19—65th Congress.]
(H. R. 328.)

An Act to Amend an Act entitled "An Act to Regulate Commerce," as amended, in respect of car service, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of the Act entitled "An Act to regulate commerce," approved February twenty-fourth,* eighteen hundred and eighty-seven, as heretofore amended, is further amended by adding thereto the following:

The term "car service" as used in this Act shall include the movement, distribution, exchange, interchange, and return of cars used in the transportation of property by any carrier subject to the provisions of this Act.

It shall be the duty of every such carrier to establish, observe and enforce just and reasonable rules, regulations, and practices with respect to car service, and every unjust and unreasonable rule, regulation, and practice with respect to car service is prohibited and declared to be unlawful.

The Interstate Commerce Commission is hereby authorized by general or special orders to require all carriers subject to the provisions of the Act, or any of them, to file with it from time to time their rules and regulations with respect to car service, and the commission may, in its discretion, direct that the said rules and regulations shall be incorporated in their schedules showing rates, fares, and charges for transportation and be subject to any or all of the provisions of the Act relating thereto.

The commission shall, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service, including the classification of cars, compensation to be paid for the use of any car not owned by any such common carrier and the penalties or other sanctions for nonobservance of such rules.

Whenever the commission shall be of opinion that necessity exists of immediate action with respect to the supply or use of cars for transportation of property, the commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleading by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the commission may determine, to suspend the operation of any or all rules, regulations, or practices then established with respect to car service for such time as may be determined by the commission, and also authority to make such just and reasonable directions with respect to car service during such time as in its opinion will best promote car service in the interest of the public and the commerce of the people.

The directions of the commission as to car service may be made through and by such agents or agencies as the commission shall designate and appoint for that purpose.

In case of failure or refusal on the part of any carrier, receiver, or trustee to comply with any direction or order with respect to car service, such carrier, receiver, or trustee shall be liable to a penalty of not less than $100 nor more than $500 for each such offense and $50 for each and every day of the continuance of such offense, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Approved May 29, 1917.

* This is erroneous. The Act to Regulate Commerce was approved February 4, 1887, and not February 24, as recited in the above act.—Ed.

Accidents At Crossings—Duty To Stop.—In an action to recover damages for injuries received at a railroad crossing, it appeared that a string of box cars a quarter of a mile long was standing on a side track 43 feet and 6 inches from the main line and that the last car in the string projected some 22 feet into the street on which plaintiff was driving, so that it was necessary to "hook around" the car to pass. Plaintiff was well acquainted with the crossing, having used the same on numerous occasions. At the time of the accident he was driving a four-horse team hitched to a heavy farm wagon. He testified that he saw the train approaching just as soon as he passed the car. It was developed by a mathematical calculation that when he passed the car which projected into the street, the noses of the lead horses were 17 feet from the nearest rail. HELD, that plaintiff was guilty of contributory negligence barring recovery. Crawson v. Minneapolis St. P. & S. M. Ry. Co. (N.D.) 1161 N. W. 725.

Master and Servant—Warning Employees and Promulgating Rules.—Freight handler sued for injuries received in transferring steel rails from one box car to another standing at the same platform, on a two-wheeled truck. A change of level caused a slipping of a rail against one of the handles of the truck, whereby the plaintiff's thumb was broken. The charges of negligence were: (1) Failure to warn; (2) failure to furnish adequate help; (3) failure to properly equip the truck; (4) failure to promulgate rules governing the plaintiff's conduct. The Iowa Supreme Court holds that the dangers in transferring steel rails from one car to another, under such circumstances, are so obvious, and the work and tools used so simple, as to leave no room for warning by the employer. Nor was there anything in the evidence to justify a finding that there was any violation of duty to promulgate rules. Ordinarily the duty to promulgate rules arises only when there is a plurality of employees who are so related to each other in their work that rules become necessary in order to protect each against danger from the act of the other. Assuming that an employment might be of such a nature as to cast on the employer the duty to promulgate rules for governing the conduct of a single employee as a method of protection to him as against his own act, there is no room for application of such a rule in a case like the present. There was no evidence of failure to furnish adequate help or properly equip the truck. It was held that a verdict for the defendant was properly directed. Rhodes v. Chicago, R. I. & P. R. Co., (Iowa), 161 N. W. 652.

Carriers of Livestock—Notice of Claim—Waiver.—An interstate shipment of cattle were placed in the defendant's pens for immediate shipment. Certain injuries occurred to the cattle on account of the defective pens before the cattle were loaded into the cars and before the shipping contract was executed. Further damage resulted by reason of unreasonable delay in transit. The contract provided that written notice of claim should be given the agent of the carrier before the stock were removed from destination or intermingled with other stock, otherwise the carrier would not be liable for damage occurring before the stock were loaded or while in transit. No written notice was given as required but plaintiffs contended that this stipulation had been waived, since the defendant had actual knowledge of the damage, which had been called to the attention of its agents while the shipment was in transit and had been advised orally that claim would be made. HELD, that the carrier could not waive the stipulation. Abell v. Atchison, T. & S. F. Ry. Co. (Kan.), 164 Pac. 269.

Carriers—Liability of Consignee for Undercharge.—Where a carrier has by mistake, or otherwise, delivered an interstate shipment upon payment by the consignee of less than the tariff charges, it may thereafter recover from the consignee, the difference between the correct charges and the amount collected. Cent. of Ga. Ry. Co. v. O'Neill (Ga. App), 91 S. E. 877.

Carriers—Liability of Consignor for Charges.—Where a carrier agreed to collect the charges on a shipment from the consignee, but through mistake or negligence failed to do so, it is not estopped to collect such charges from the consignor, notwithstanding that the consignee, who was responsible as between the parties has in the meantime become insolvent. So. Ry. Co. v. Sou. Cot. Oil Co. (Ga. App.), 91 S. E. 876.

Carriers of Livestock—Notice of Claim—Released Valuation—Effect of Tariff.—An interstate shipment of horses was made under a contract stipulation that notice of claim for damages must be made within five days after the stock were removed from the car. It was also stipulated that in consideration of a reduced rate carrier's liability should be limited to $100 per head for the horses. Duly established tariffs contained the form of contract and the alternative rates applicable according as the agreed valuation was accepted or not. The trial court submitted to the jury the question of the reasonableness of the notice of claim provision, and permitted the jury, if it should find such provision unreasonable, to find a verdict in excess of the limited liability contracted for. HELD, that the requirement of notice and the agreed valuation, being provided for in tariffs duly established, were binding as a matter of law until changed by order of the Interstate Commerce Commission, and it was error to submit the issue to the jury or to allow a recovery in excess of the agreed valuation. Erie R. R. Co. v. Stone & Noble, decided by U. S. Sup. Ct., June 4, 1917.

Railroads—Injuries At Crossings—Contributory Negligence of Passenger in Automobile.—Plaintiff's intestate, passenger in an automobile driven by another, riding on the front seat with the driver, approached a railroad crossing, where the view was obstructed, at a speed about equal to that of a person walking. He was engaged in conversation with another passenger, and failed to look and listen for the approach of a train as he approached the track. Had he looked when he reached a point within seven or eight feet of the track he must have seen the train approaching, and had he listened he must have heard its bell, which was ringing, and the rumbling and other noises of the train, which was approaching at an illegal rate of speed. The car was not stopped, and plaintiff's intestate did not speak to the driver. HELD, that plaintiff's intestate was guilty of negligence contributing to the collision in which he was injured. Blanchard v. Maine Cent. R. Co. (Me.), 100 Atl. 666.

Federal Employers' Liability Act—Employee Engaged In Unloading Cargo of Vessel Owned By Interstate Railroad.—At the time he was killed defendant in error's intestate was operating an electric freight truck, unloading the cargo of a steamship, which had been transported from Galveston, Texas, to New York City. The steamship was owned and operated by Plaintiff in error, an interstate railroad. It was contended that the action was controlled by the federal Employers' Liability Act. In holding that the employment did not come within the terms of the Act, the Supreme Court of the United States said:

> "Evidently the purpose was to prescribe a rule applicable where the parties are engaging in something having direct and substantial connection with railroad operations, and not with another kind of carriage recognized as separate and distinct from transportation on land and no mere adjunct thereto. It is unreasonable to suppose that Congress intended to change long-established rules applicable to maritime matters merely because the ocean-going ship concerned happened to be owned and operated by a company also a common carrier by railroad. The word 'boats' in the statute refers to vessels which may be properly regarded as in substance but part of a railroad's extension or equipment as understood and applied in common practice."

Southern Pacific Co. v. Jensen, decided by the Supreme Court of the United States, May 21, 1917.

Pass—Exemption From Liability.—A pass issued by one railway company to an officer or employee of another railway company under the provisions of the Indiana law allowing such companies to interchange passes for their officers and employees is a "free pass," and a stipulation therein that the person accepting the pass assumes all risk of accident and damage to person or property is valid. Ft. Wayne & W. V. T. Co. v. Justus (Ind.), 115 N. E. 585.

INTERSTATE COMMERCE COMMISSION DECISIONS.

OVERCHARGE, UNLESS LOWEST COMBINATION IS CHARGED

Shipment of range cattle from Cimarron, N. M. to Denver, Colo., routed, in accordance with instructions, by way of the St. Louis, Rocky Mountain & Pacific Railway from Cimarron to Raton, N. M., and A. T. & S. F. thence to destination. Charges were assessed based on rate of 18 cents per 100 from Cimarron to Raton, and $53.68 per car, Raton to Denver. At the time there was a lower combination effective over the route of movement composed of rate of 15.5 cents per 100, Cimarron to Clifton House Junction, N. M., and $53.68 thence to Denver.

HELD: Shipments were overcharged to extent charges exceeded latter combination. Denver Live Stock Com. Co. v. St. Louis, R. M. & P. Ry. Co., et al., 42 I. C. C. R. 127.

TARIFFS TO BE CONSTRUED ACCORDING TO THEIR LANGUAGE AND NOT ACCORDING TO INTENTION OF FRAMERS.

Shipment originating at Cincinnati, consigned to Richmond, and after arrival reconsigned to Boston, Mass. There being no through rate the combination on Richmond was charged. Complainant contended lower combination was possible, made on Covington, Ky. C. & O. defended that this combination was not applicable, under the reconsigning provisions of the tariff, to traffic moving via Richmond, but only to traffic moving via the direct route via C. & O. to Potomac Yards. C. & O. tariff in effect, however, provided on its face:

> "Joint freight tariff between the C. & O. Railway and New York, New Haven & Hartford Railroad and Boston & Maine Railroad, in connection with R. F. & P. R. R. and the Penna. R. R. via Richmond, Va., and Doswell, Va., Washington, D. C., Penna. R. R. and Jersey City, N. J."

The tariff contained no restriction with respect to routing by way of Richmond.

C. &O. argues this language was intended to indicate the establishment of through routes from stations on its line by way of such junction points as might be most convenient or economical, and that Richmond is excluded as a junction point between Cincinnati and Boston as involving an uneconomical and circuitous route.

HELD: While it may have been the intention to apply the tariff in its restricted sense, tariffs are to be construed according to their language and the intention of the framers is not controlling, and that the rate from Covington to Boston applied by way of Richmond, which rate made the lowest combination. Boldt &. Co. v. Pittsburgh, C. C. & St. L. Ry., 42 I. C. C. R. 308.

EVIDENCE OF INTENTION OF SHIPPER AS TO WHETHER CARLOAD OR LESS-THAN-CARLOAD RATE WAS TO BE USED.

Complainant shipped less than the minimum, but application of carload rate on the carload minimum would have made lower than the charges resulting from the application of the l. c. l. rate. It was contended that the carload rate should have been applied.

HELD: That the goods as shipped could move only under the carload rate and minimum, and were so intended to move, as shown by the fact that each package was not marked with the name of the destination. Kyle v. Missouri, K. & T. Ry. Co., et al., 42 I. C. C. R. 335.

OBLIGATION PUT ON INITIAL CARRIER BY WORDS "FOR RESHIPMENT" ON BILLING.

Shipments from Texas consigned to Greenville, S. C., "for reshipment." At Memphis one carload went via the Southern and the other via the N. C. & St. L., Seaboard Air Line, and Piedmont & Northern. No joint rate applied and same combination was charged to Greenville on both cars. Southern Railway permitted reshipping from Greenville to various points on its line and on the lines of other carriers; the Piedmont & Northern only to specified points on its line. Newberry, to which reshipped, is on the Southern, but not on the Piedmont & Northern. No additional charge entailed on Shipments over the Southern, but on the shipments coming into Greenville over the Piedmont & Northern an additional charge of 26 cents per 100 applied. This additional charge is sought to be recovered. Complainant insists the notation "for reshipment" was notice to the initial carrier of intention to avail of the tariff provisions governing reshipping, and the movement via the Piedmont & Northern was misrouting and should have been via Southern.

HELD: Defendants had no knowledge shipment was to be ultimately shipped to Newberry, and there is merit in their contention that under Conference Ruling 214 (g) agents routing shipments cannot reasonably be expected to know the different reshipping rules at distant points, and on the lines of distant roads to or with which there are no specific joint rates. No misrouting. Elmore, Brame Co. v. San Antonio & A. P. Ry. Co., et al., 42 I. C. C. R. 351.

CARRIER NOT RESPONSIBLE FOR MISROUTING

Shipper made error in stating destination point; the carrier's agent made error by executing the erroneous bill of lading and the agent of destination carrier erred in not obtaining definite information from initial carrier or from shipper as to correct destination.

HELD: Under the circumstances that by reason of its own error complainant may not impute negligence to any of defendants, notwithstanding fact defendants failed to meet their full duty respecting the shipment. Riverside Western Oil Co. v. Midland Valley R. R. Co., et al., 42 I. C. C. R. 589.

UNREPEATED TELEGRAPH MESSAGES

Defendant accepted for transmission message reading as follows: "Haven't sold car which you shipped." The message was delivered to the addressee as follows: "Have sold car which you shipped." By reason of the error in transmission complainant lost $1,790, which complainant seeks to recover as damages.

HELD: The rate voluntarily used by the senders of the message in question was an unrepeated rate to which was lawfully attached the restricted liability insisted upon here by defendant, $50; that Congress has expressly authorized such rates with restricted liability attached, and that such rates are not therefore contrary to public policy, but on the contrary are binding upon all until lawfully changed. Clay County Produce Co. v. Western Union Telegraph Co., 44 I. C. C. R. 670.

REFUSAL TO REFUND PREPAID FREIGHT CHARGES, IN CASE OF LOSS BY FIRE IN TRANSIT, NOT VIOLATION OF ACT TO REGULATE COMMERCE

Billiard table parts, shipped from Muskegon, Mich., to Mexico City, in 1913, damaged by fire after being loaded on board the exporting steamer at New Orleans. Steamer line and initial carrier both declined to refund prepaid freight charges, the steamship line standing on its bill of lading provision that "freight prepaid shall not be returned, goods or vessel lost or not lost." Complainant's claim was based on the following provision in the bill of lading of the initial rail carrier: "The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, **including the freight charges, if prepaid**), at the place and time of shipment."

HELD: the Commission is without jurisdiction to determine either the legal liability of the steamer line for the physical damage to the property or the property of the bill of lading provision relied upon by that carrier in declining to refund the freight charges. The Commission may only award damages for violations of the Act to Regulate Commerce, and not damages due to other causes. It therefore follows that if complainant has cause of action it is for loss and damage cognizable in the courts and not by the Commission, because no violation of any of the provisions of the Act was disclosed.

Although the Commission declined to take jurisdiction, it is interesting to note the remarks concerning the liability of the initial carrier for damages occurring beyond the ports of the United States, as follows:

The Carmack amendment was in effect when the shipment took place, but that provision did not apply to foreign commerce, which this is. The Carmack amendment was extended June 2, 1915, so as to include and apply to property received for transportation from any point in the United States to a point in an **adjacent** foreign country. It is clear from the wording of the Carmack and Cummins amendments that when the shipment moved the initial carrier was not liable for loss, damage or injury when caused by carriers parties to the transportation beyond our ports or borders. The essential character of this shipment was that of "foreign commerce," or "property received for transportation to an adjacent foreign country," and that Congress did not regard the Carmack amendment as applicable to such shipments may be inferred from the fact that the provision was extended by the Cummins amendment to apply to commerce to an adjacent foreign country. Brunswick-Balke-Collender Co. v. T. S. & M. Ry. Co., et al., 44 I. C. C. R. 598.

Safety Appliance Act—Breaking in Two of Train—Evidence of Negligence.—In an action under the Federal Employers' Liability Act, the evidence tended to show the following facts: Plaintiff's intestate, at the time in question, was head brakeman on an extra freight train running from Albert Lea, Minn., to Minneapolis, and transporting in interstate commerce. As the train left Jordan, an intermediate station, deceased boarded a car toward the rear end and was proceeding along the tops of the cars toward the locomotive, when the train separated because of the opening of a coupler on one of the cars, resulting in the automatic setting of the emergency brakes and a sudden jerk, which threw deceased off the train and under the wheels. At the trial, under an instruction of the court, the jury was permitted to infer negligence on the part of the company from the fact that the coupler failed to perform its function, there being no other proof of negligence. It was urged that this was error, but the Supreme Court held that the contention was without merit, because of the positive duty imposed by the Safety Appliance Act upon the railroad to furnish safe appliances for the coupling of cars. Minneapolis & St. Louis Co. v. Gotschall, decided by the United States Supreme Court, May 21, 1917.

Federal Employers' Liability Act—Interstate Employment—Movement From Receiving To Unloading Track.—At the time plaintiff was injured, he was assisting as a member of the switching crew in placing three cars containing a supply of coal for defendant on an unloading trestle within its yards at Cortland, N. Y. These cars belonged to it and with their contents had passed over its line from Sayre, Pa. After being received at Cortland Yards, one July 3 and two July 10, they remained there upon sidings until being removed to trestle on the 27th. Under authority of Chicago, Burlington & Quincy Railroad Company v. Harrington, 241 U. S. 177, it was held that the interstate movement terminated before the cars left the sidings and that, while removing them, the switching crew was not engaged in interstate commerce. Lehigh Valley R. Co. v. Barlow, decided by U. S. Supreme Court, May 21, 1917.

Railroads—Employment in Interstate Commerce—Light Engine.—Where an engine of an interstate railroad, after moving freight and milk trains, was ordered to a certain point for passenger service, and then to another point, and in the last trip an employee was killed, the employee was not engaged in interstate commerce within the Federal Employers' Liability Act, although the freight and milk trains may have contained interstate shipments, since the engine's connection with such trains had ceased. Hoag v. Ulster & D. R. Co., 164 N. Y. Supp. 529.

Federal Employers' Liability Act—"Engaged In Interstate Commerce—Cleaning Ditches.—A section man injured while clearing ditches along defendant railroad's tracks was engaged in interstate commerce within the meaning of the federal Employers' liability Act. Louisville & N. R. Co. v. Blankenship (Ala.), 74 So. 960.

Carrier—Conventional Limitation of Time For Suit.—A stipulation in a contract for the carriage of livestock, that the carrier will not be liable for injuries to the stock unless suit is brought within six months after the right of action accrues is reasonable and valid, and where fraud is relied upon to prevent the bar of the stipulation from attaching it must be such fraud as involves moral turpitude. Cherokee Sawmill Co. v. Nashville, C. & St. Louis Ry. Co. (Ga. App.), 91 S. E. 790.

Railroads—Injury To Trespasser Riding Upon Engine.—Where a boy climbs into a switch engine and his presence is known to the fireman, but not to the engineer, and the engine is struck by a freight train and the boy is caught and killed in the wreck, though the engineer and fireman saved their lives by jumping from the engine before the collision, the fact that the fireman who had no authority to do so, permitted the boy to remain on the engine does not establish wanton or willful negligence on the part of the railway company, so as to render it liable for damages in an action brought by the boy's parents. Garcia v. Atchison, T. & S. F. Ry. Co. (Kan.), 164 Pac. 272.

Carriers of Goods — Carmack Amendment.—Where a shipment of freight is lost at sea under circumstances which excuse the shipowners from liability under the maritime laws, the initial rail carrier cannot be held liable by virtue of the Carmack Amendment. Price v. Southern Ry. Co. (N. C.), 92 S. E. 182.

Carriers—Loss of Ticket—Ejection.—Where a passenger claiming to have misplaced his ticket and has been given a reasonable opportunity to find and surrender it to the conductor, and makes no offer to pay the cash fare, his ejection from the train is legal and he cannot, after being ejected at a place where the train is not scheduled to stop, demand the right to re-enter. Foskey v. Wrightsville & T. R. Co. (Ga.), 92 S. E. 34.

Carriers of Goods—Damages For Misrepresentation of Tariff.—A shipment of coal was made from Superior, Wis., to Minneapolis, Minn. Plaintiffs telephoned the agent of the delivering carrier, the defendant, stating they desired to buy the coal if it could be reconsigned to Montevideo, Minn., on the through rate. The agent advised that it could be so reconsigned. Plaintiffs thereupon bought the coal and directed the agent of the defendant to forward the shipment to Montevideo via the C., M. & St. P. R. Co., with the reservation, however, that if the through rate from Superior to Montevideo would not apply, it was not to be forwarded. The shipment moved to Montevideo, but the through rate did not apply and the plaintiff was compelled to pay $47.04 more freight charges than would have been due if the through rate had been used. The action was to recover this amount as damages growing out of the agent's misrepresentation of the tariff. HELD, plaintiffs were not entitled to recover since the terms of the tariff were a matter of law of which the plaintiffs, as well as the defendant, were bound to take notice. Goodnow Coal Co. v. Nor. Pac. Ry. Co. (Minn.), 162 N. W. 519.

Carriers—Carrying Passenger Beyond Destination—Circumstances Under Which Passenger Should Exhibit Ticket.—Where a passenger is not required to exhibit his ticket at the station where he embarks upon his journey, the carrier has no notice of such ticket until same is exhibited to the conductor or auditor, as the case may be, whose duty it is to lift or check such tickets. In such cases, it can readily be seen that the company might not have any notice of the passenger's ticket and of its contractual obligations until it was too late in the exercise of ordinary care to carry out its contract as evidenced by the ticket. Thus, where one purchases a ticket to a flag station a short distance away and it is impossible for the conductor to check up the tickets in the exercise of reasonable diligence before reaching the flag station where the passenger was to disembark, it is the duty of the passenger to notify the conductor of his destination so that the train may be stopped at the flag station. Chicago, R. I. & P. R. Co. v. Blundell (Ark.), 191 S. W. 941.

Carriers—Delay—Right of Purchasers of Bill of Lading After Delay Occurred to Sue—A shipment of automobiles was made by the Studebaker Corporation to its own order with direction to notify the plaintiff, and a draft was drawn on the plaintiff and forwarded with the bill of lading attached in the usual way to a bank at the destination of the shipment. The shipment was delayed in transit. The plaintiff, however, did not pay the draft and take up the bill of lading until after the shipment had arrived at destination. HELD, that plaintiff, being neither the owner of the shipment nor the holder of the bill of lading at the time the delay occurred, had no standing to sue therefor. F. W. McNeely & Co. v. Lake Shore & M. S. Ry. Co. (Ind.), 115 N. E. 954.

Interstate Commerce—Bridge Painter.—Plaintiff was injured while at work painting a bridge on defendant's main line, which was used in interstate commerce. The evidence showed this work was necessary to preserve the bridge and keep it in proper repair. It was held that at the time of the accident defendant was engaged and the plaintiff was employed in interstate commerce under the authority of the Peterson case. Louisville & N. R. R. Co. v. Netherton (Ky.), 193 S. W. 1035.

Employers' Liability Act—Member of Posse Pursuing Train Robbers.—One of defendant's trains engaged in interstate commerce was held up and robbed. A posse was formed and taken to scene of robbery by defendant in one of its trains for the purpose of trying to apprehend the robbers. Deceased intestate was in charge of some blood hounds. While some of the posse were alighting from the train, a gun in hands of one of the deputy sheriffs was discharged and plaintiff's intestate was killed.

In a suit brought under the Federal Act it was held that there could be no recovery for under the facts proven plaintiff's intestate was performing no service that was so related to or connected with interstate commerce as to form a part thereof. Bonner, Admx., v. Ala. G. S. (Ala.), 74 So.

Railroads — Crossing Accidents — Proximate Cause.—In an action to recover for the death of a person killed at a railway crossing where the negligence relied upon is the failure of the defendant to sound the whistle 80 rods from the crossing, the rule is applied that, as deceased knew the train was approaching, she needed no notice of the fact, and the omission to sound the whistle will not create a liability against the railway company when such omission or neglect of duty was not the proximate cause of the injury. Williams v. Atchison, T. & S. F. Ry. Co. (Kan.), 164 Pac. 260.

Master and Servant—Sufficiency of Evidence as to Cause of Accident.—Decedent met his death by falling from a box car as it came to a stop after being shoved into a side track. There was no contention that the stop was unusual, but plaintiff's theory was that the fall of the decedent was caused by defects in the roof of the car. The proven defects were that at a point 12 feet from the end of the car one of the planks in the running board stuck up about 1½ inches, and at a point 14 feet from the other end two nails in one plank and the ends of two planks were sticking up somewhat. It was also shown that the north end of the running board was loose and tilted up, and that board at the north end of the roof was tilted up above the edge of the adjoining board. Just as the car came to a stop, decedent's lantern was seen to fall from the north end of the car but there was no one who actually saw decedent fall. HELD, that there was not sufficient evidence to show a causal connection between the defect and the death, and that the jury should not be allowed to speculate as to the cause of the accident. White v. Lehigh Valley R. Co. (N.Y.), 115 N. E. 438.

Carriers—Passengers—Right To Use Ticket Purchased From Private Individual At Reduced Rate.—Where a private individual sold a return trip ticket at a price less than the single fare, the buyer had no right to use it when it contained a stipulation that it could be used only by the original purchaser, especially in view of the fact that his use would be a violation of the federal statute requiring uniform rates and the holder of such ticket has no cause of action against the carrier for "lifting" the ticket when presented for passage and refusing to allow the holder to board the train. Boston v. Southern Pac. Co. (Ky.), 194 S. W. 814.

Railroads—Injury At Crossing—Negligence.—Where a decedent was driving in a closed wagon with curtains, sliding door and a glass front upon a turnpike which paralleled the railroad for some distance before crossing it, and a train running in the same direction in which he was going struck him as he was about to cross, causing fatal injuries, the view being unobstructed at the crossing for a long distance, the presumption that decedent stopped, looked and listened before attempting to cross was rebutted by the circumstances, although there was no direct evidence on this point, and the court properly directed a verdict for defendant. Miller, &c., v. Penn. R. Co. (Pa.), 100 Atl. 654.

Interstate Commerce — Persons Engaged In Clearing Wreck On Interstate Track.—Plaintiff had been engaged in inspecting cars on an interstate train. While he was waiting for other cars to be put in this train, a collision occurred in the yards nearby and several tracks were blocked by the wreckage. One of defendant's employees was caught beneath one of these cars and plaintiff immediately left his work of inspection and went to the scene of the wreck to render assistance. He was instructed to get a jack to raise the car and release the employee pinned thereunder. While plaintiff was carrying some blocks to be used in jacking up the wrecked car he stumbled over an obstruction in the yards and was injured. The track which was blocked by the wreck was the track upon which the interstate train being made up was to move out, and, by reason of the wreck, it was necessary to detour this train over other tracks. It was held that the plaintiff was engaged in interstate commerce on the ground that the object of clearing the tracks entered inseparably into the purpose of jacking up the car; that, although plaintiff's primary object may have been to rescue his fellow employee his act, nevertheless, was the first step in clearing the obstruction from the tracks to the end that the interstate train might be made up and that his work facilitated interstate transportation and, consequently, plaintiff was engaged in interstate commerce when injured. Southern R. Co. v. Puckett, Supreme Court, U. S., No. 219, October Term 1916, decided June 11, 1917.

Railroads—Fires — Evidence of Negligence.—The origin of fire near tracks may be established by circumstantial evidence but the circumstances proven must have sufficient probative force to justify a finding that the fire originated from an engine and the fact that an engine passed by a building, situated 75 feet from the track, half an hour before the fire broke out is insufficient to warrant a finding that such fire was caused by the engine. J. S. Moore & Co. v. Atlantic C. L. R. Co. (N. C.), 92 S. E. 1.

Railroads—Crossing—Contributory Negligence.—Failure of the railroad company to ring the bell or blow the whistle as the train approached the crossing, even though it may have been negligent, would not make the railroad company liable for the death of the automobile driver in a collision at the crossing, if he recklessly failed and neglected to have his car under control and by looking and listening at the proper time and place could have seen the approaching train in time to stop before reaching the track. Askey v. Chicago, B. & I. R. Co. (Neb.), 162 N. W. 647.

Negligence of Trespasser on Track—Last Clear Chance—Continuing Negligence.—The doctrine of last clear chance has no application to a case in which the negligence of the injured party continued until the moment of the accident, and was the proximate cause of it. Thus, where a trespasser continued walking on the railroad track without observing the train until the tender of the locomotive struck him there could be no recovery. Wood v. Longbill Lumber Company (La.), 74 So. 990.

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THE MEMORANDUM

Vol. II No. 12

LAW DEPARTMENT JULY, 1917. SOUTHERN RAILWAY COMPANY

CLAIMS OF PASSENGERS FOR DAMAGES FOR IMPROPER TREATMENT BY EMPLOYEES AND OTHER PASSENGERS.

There is probably no class of claims against railroads where so frequently exorbitant damages are awarded with less foundation than those where passengers sue for alleged improper treatment by employees or passengers. The degree of care and diligence to which passengers are entitled for their safety and comfort by railroads and their employees has long been settled. That female passengers in particular are entitled to such care is not questioned. That the law is wise and proper is not debatable. That it is at least sometimes misused as the basis to procure unjust and exorbitant damages is also true.

The duties of a conductor are at best trying and difficult. It requires a man of much tact, discretion, good judgment, patience and diplomacy. Embarrassing complications as to what action he should take are frequent. For instance, it sometimes occurs that a woman passenger, with five of her children accompanying her, will insist that neither of them is upwards of five years of age and liable for fare. Under such circumstances, what is the conductor to do? He dare not question the accuracy of the statement, and yet if he permits a child over the stipulated age to be transported without fare, he is unjust to his employer, fails to comply with its rules and regulations, violates the law, and encourages bad conduct upon the part of passengers. Yet if he questions the statement he certainly will bring trouble to the railroad and probably to himself.

In the case of Ransom v. Georgia, S. & F. R. Co., 6 Ga. App. 740, plaintiff, a woman passenger, with two small children, had misplaced her ticket. The conductor went to her several times for it. He gave her ample time and opportunity to find it. She was unable to find it, and, as she claimed, he finally paid her fare and stated to her, in the presence of other passengers, "You are a woman. You can take advantage of me. I will just pay your fare for you in the presence of these gentlemen." On the first trial a verdict for $700.00 was rendered. A new trial was granted. On the second trial a verdict for $1,000.00 was rendered. On the third trial a verdict for $700.00 was rendered, and was affirmed. The defendant submitted evidence of the reputation of the conductor for uniform politeness and courtesy to passengers, but it evidently availed it nothing.

What should a conductor do with a passenger whole physical appearance is such that it is difficult to determine whether he is a Caucasian or a negro? The Georgia law requires the races to be separated. Often the conductor, acting in perfect good faith, must determine that question at the peril of the railroad and of himself. In the case of Wolfe v. Georgia Railway & Electric Co., 2 Ga. App. 499, it was held actionable to erroneously require a white passenger on a street car to sit in the portion of it used for negroes. There was finally no recovery because of technical mistakes in pleadings. Same case, 6 Ga. App. 410. Same case 124 Ga. 693.

Passengers not infrequently take advantage of the legal duty imposed on conductors and are purposely more provoking in their conduct towards such employees than they otherwise would be. The Georgia Court of Appeals gave recognition to this in the case of Georgia Ry. & Elec. Co. v. Rich, 9 Ga. App. 497-99, where it was said:

> "We are not unaware of the trying situation in which street-car conductors in many of our Southern cities are often placed by the insolvent and designedly offensive conduct of that lower element of the negro race which makes it a point to take advantage of their position as passengers to use to street-car employees, while on duty, wanton and insulting language which they would not dare to use under other circumstances."

Unfortunately such conduct of passengers is not confined to the section mentioned, or the specified class of the particular race, nor is such offensive conduct restricted to employees of street railroads. In that case the court held that even though the conductor was justified in striking the offensive passenger, if, as a result thereof, the latter fell on or against another passenger and injured her, the company was not liable. That is the law, and yet if a party should shoot at a person making an assault on him and should injure or kill a bystander, if as a matter of law he would have been justified in killing the party making the assault on him, he would not be guilty of an offense in injuring the bystander. Of course this apparent anomaly is due to the different rules of evidence and weight of proofs applicable to civil and criminal cases as well as to the legal duty of carriers to protect their passengers.

The Supreme Court of Georgia said in the case of Peavy v. Georgia Railroad & Banking Co., 81 Ga. p. 485-488:

> "Plaintiff unfitted the conductor for exercising the care and prudence that was essential to guarding the interest of the company, and essential to performing in a proper manner his duty to the company or to the plaintiff. The plaintiff spoiled the instrument, and then sued the manager because the performer did not make good music. It was the plaintiff's fault that the conductor was out of tune."

It was there held that though the conductor was not entirely excusable, the company was not at fault and that a second verdict for plaintiff was properly set aside. This decision, with many others of a similar character, was reviewed and criticised in the case of Mason v. Nashville, &c., Ry. Co., 135 Ga. 741, and practically reversed, the court there holding that in order to exonerate the railroad the conductor must have been justified in any assault on or mistreatment of the passengers.

What should be done with a passenger who is seemingly more or less intoxicated is practically always a question of much doubt. If transportation is refused him, or if he is ejected from the train because his conduct or conversation indicates intoxication and annoyance of or possible danger to other passengers, there is usually a suit for damages supported by abundant evidence of plaintiff and others of his complete soberness and perfect behavior before he was ejected. In the case of O'Quinn v. Seaboard A. L. Ry., 124 Ga. 358, plaintiff was put off of a train by employees of defendant, as the railroad contended, because he was partially intoxicated and was using profane and obscene language. An amended plea of defendant alleging that, since the filing of the suit, the plaintiff had been indicted and convicted in the Superior Court of Chatham County for using profane, obscene and vulgar language, in the presence of females, on a passenger-car, on the same day, was refused and evidence to support it was rejected. It is to be inferred that the evidence related to the same transaction. A verdict for plaintiff for $500.00 was affirmed. Doubtless that was in excess of the fine imposed for the criminal offense.

Whether a carrier should apprehend that an intoxicated passenger, who was armed with a pistol and who had been shooting while on the train, would jump from it at the station and fire the pistol into a coach and injure another passenger, was held to be a question for a jury in the case of Grimsley v. Atlantic C. L. R. R. Co., 1 Ga. App. 557, where quite a number of cases are cited in support of the ruling made.

> "It is the duty of the servant of the carrier to eject a drunken passenger from the train or other vehicle of transportation before he has committed any overt act of violence, if, because of his condition, there is any reason to apprehend injury or annoyance to other passengers. But a failure to eject a passenger merely because he is drunk, if otherwise well behaved, will not alone subject a carrier to liability for an injury caused by his acts or conduct."

5 Am. & Eng. Ency. of Law, 2d Edition, 558.

> "It does not follow and cannot be presumed that because a man is drunk, and is, in that condition, offensive to others, as well by his demeanor as in his appearance, that he is a dangerous man, and that his presence imperils the safety of others; that because he is drunk he may violently assault or murder others without provocation."

Putnam v. Broadway, &c., R. R. Co., 14 Am. Rep. 190.

The train crew arrested two negro tramps for stealing a ride and tied them with a rope in the baggage car. The express messenger was in the same car in the performance of his duties. Subsequently the parties arrested endeavored to escape and the baggagemaster attempted to restrain them. They each drew a pistol and began firing, and one of them shot the express messenger. The latter brought suit to recover damages from the railroad. A general demurrer to plaintiff's suit was overruled by the trial court, and the ruling was reversed by the Supreme Court of Georgia. The court said:

> "The presence upon a train of two negro tramps, secreted and stealing a ride thereon, would not alone be sufficient to cause the employees in charge of the train to suspect that such tramps were armed with deadly weapons, and to anticipate that when brought into the train under arrest they might endeavor to escape and, while an employee was attempting to prevent the escape, make a murderous assault with such weapons upon one to whom the railroad company owed the duty of protection and who was taking no part in the effort to prevent the escape."

Savannah, &c., Ry. Co. v. Boyle, and vice versa, 115 Ga. 836 (1st and 2d headnotes).

> "A railroad company is bound to use extraordinary diligence to protect a passenger, while in transit, from violence or injury by third persons; but where the passenger is arrested by officers of the law, the company is under no duty to inquire into the legality of the arrest.
>
> "Where such arrest by officers of the law is illegal but the railroad company has no notice of that fact, the company is not liable to the passenger for a failure to interfere with the officers and prevent the arrest, or for stopping the train to allow the officers to remove their prisoner therefrom."

Brunswick & Western R. R. Co. v Ponder, 117 Ga. 63.

No reference has been made to the duty of conductors and other employees to sick passengers or others who may be incapable of properly caring for themselves. If time permitted, this phase might be considered with profit.

JOS. W. BENNET.

Brunswick, Ga., July 16, 1917.

RESIDENT OF STATE ENJOINED FROM SUING IN ANOTHER STATE.

Some of the most serious cases against this company are those procured by counsel in a State different from the State of residence of the plaintiff, and different from the State in which the cause of action arose, and brought in the courts of such other State because the law as construed by such other courts is more favorable than in the State where the cause of action arose. The Supreme Court of Alabama recently sustained an injunction against a resident of the State going into Georgia and bringing suit there for an injury received in Alabama.

The opinion is herewith reprinted in full:

THE SUPREME COURT OF ALABAMA, OCTOBER TERM, 1916-17.

7 Div. 850.

Walter Weaver v. Alabama Great Southern Railroad Co. Appeal from DeKalb Chancery Court.

Somerville, J.

It is well settled that the courts of one state may take jurisdiction of a transitory cause of action originating in another state, when the defendant has been locally found and served, even though both parties are at the time domiciliary residents of the foreign state. Eingartner v. Illinois Steel Co. (Wis.), 59 Am. St. Rep. 859, and note, 869; Tenn. Coal Co. v. George, 233 U. S. 354.

In this case it is not denied by complainant that the city court of Atlanta, Ga., has acquired jurisdiction of the cause, and may properly proceed with its trial and determination, if prosecuted there by the plaintiff.

Complainant, however, invokes another principle which is also thoroughly well settled by the highest authority. This principle is stated by Judge Story as follows: "But, although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act **in personam** upon those parties, and direct them, by injunction, to proceed no further in such suit. In such a case, these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject matter of the dispute, they consider the equities between the parties, and decree **in personam** according to those equities, and enforce obedience to their decrees by process **in personam**. * * * It is now held that whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally, with respect to the subject of suits in a foreign country, as the ends of justice may require; and, with that view, to order them to take, or omit to take, any steps or proceedings in any other court of justice, whether in the same country, or in any foreign country."—Story Eq. Jur. §§899-900.

This text is quoted, and its doctrine affirmed, in Cole v. Cunningham, 153 U. S. 107, 118; Allen v. Buchanan, 97 Ala. 399, 402; Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573; Wierse v. Thomas, 145 N. C. 264, 59 S. E. 58, 122 Am. St. Rep. 446, 15 L. R. A. (N.S.), 1008; and in Judge Freeman's note to Eingartner v. Illinois Steel Co. (Wis.), 59 Am. St. Rep. 859, 879. The leading text writers are in full accord with Judge Story: 6 Pom. Eq. Jur. §670; 1 High on Injunctions, §§103, 107; 16 A. & E. Enc. Law, 421; 14 R. C. L. §§113-116. A few of the leading cases in which this doctrine is expounded and applied are: Dehon v. Foster, 4 Allen (Mass.), 545; Keyser v. Rice, 47 Md. 203, 28 Am. Rep. 448; Sandage v. Studebaker Co. 142 Ind. 148, 51 Am. St. Rep. 165; Rader v. Stubblefield, 43 Wash. 334; 10 Ann. Cas. 20, and note, 26.

The chief foundation for the rule is that "as long as a citizen belongs to a state he owes it obedience, and, as between states, the state in which he is domiciled has jurisdiction over his person and his personal relations to other citizens of the state.—Keyser v. Rice, supra; Sandage v. Studebaker Co., supra; Carpenter v. Hanes, 162 N. C. 46, 77 S. E. 1101; Ann. Cas. 1915-A, 832; 14 R. C. L. §114.

It is now settled beyond controversy that the exercise of this power of restraint by the courts of a state over its own citizens does not offend the Federal Constitution, especially sections 1 and 2, of article 4, guaranteeing full faith and credit in each state to the judicial proceedings of the several states, and equality of privileges and immunities for their citizens. Cole v. Cunningham, 133 U. S. 107; Allen v. Buchanan, 97 Ala. 399, 403.

The power is not exercised capriciously, nor merely to compel litigants to use the courts of their own state, nor even because the complainant has good reason to apprehend a less favorable result for himself in a foreign court. 14 R. C. L. §119.

The true basis for its exercise is, we think, correctly stated by Judge Freeman, as follows: "It may, therefore, with confidence, be affirmed that the courts of one state may enjoin the prosecution of a judicial proceeding in another state upon substantially the same grounds that the courts of one nation may enjoin the prosecution of a suit or action in the courts of another nation. It will be found, upon an examination of the decisions upon this subject, that it is not necessary, in order to obtain relief, to establish the usual grounds for equitable interposition, namely, fraud, accident, or mistake, but that it will be sufficient to entitle a citizen of a state to injunction preventing another citizen thereof from prosecuting an action against the former in the courts of another state, to show that **the purpose or necessary effect of such action is to obtain an advantage to which the plaintiff therein is not entitled in the domicile of the parties**" (italics ours). Note to Eingartner v. Illinois Steel Co., 59 Am. St. Rep. 869, 880. Numerous authorities supporting this statement of the law are collected in the notes to Rader v. Stubblefield, 10 Ann. Cas. 26; and Greer v. Cook, 16 Ann. Cas. 673. A purpose **to evade the effect of the law of the domicile of the parties**, by suing in a foreign state where the substantive law is materially different, is every where as a sufficient ground for injunctive relief.

14 R. C. L. §116, and cases cited. This is founded on the just conception that there is essential injustice in the enforcement of rights and duties according to any other standard than that fixed by the law of the place where the parties reside, and where the right or duty arose and the alleged breach occurred. The doctrine is summarized by the Supreme Court of Georgia in Engel v. Scheuerman, 40 Ga. 206, 2 Am. Rep. 573, by declaring that, "In the language of the master of the rolls, in Cranstown v. Johnston, 3 Vesey, Jr. 183, this court will not permit the defendant to avail himself of the law of any other country to do what would be gross injustice." And we may here appropriately observe that it makes no difference whether the law to be evaded is one of legislative enactment (as in Allen v. Buchanan, 97 Ala. 399), or of judicial decision; for the injustice of the result is the same in either case, and the logic of the remedy tolerates no such distinction. The real and decisive question in the instant case is whether or not there is such a difference between the law of Georgia and the law of Alabama, with respect to the effect of respondent's conduct in crossing complainant's railroad track upon his right to recover for the negligence of complainant, as would deprive complainant of a substantial right in resisting and defeating respondent's action in the Georgia court. Or, to state it differently, can respondent there subject complainant to liability, notwithstanding conduct of his own which in Alabama courts would be a complete legal bar to such liability?

In Alabama it is a fixed rule of law that one who goes upon a railroad track without stopping, looking, and listening for approaching trains, **immediately** before doing so, and thereby proximately contributes to his injury by collision, cannot recover damages for the previous simple negligence of the railroad company; and where obstructions interfere with his view of the track, it is all the more his duty to stop, look, and listen at a point where he can best see and hear, and, seeing or hearing, avoid an onrushing train. L. & N. R. R. Co. v. Turner, 192 Ala. 392, 68 South. 277, and cases cited; Peters v. So. Ry. Co. 135 Ala. 533; C. of Ga. R. R. Co. v. Foshee, 125 Ala. 213; Gothard v. A. G. S. R. R. Co. 67 Ala. 119.

So, also, it is a fixed rule of law in Alabama that one who discovers the imminent approach of a train moving at a dangerous rate of speed, and, measuring the distance to the crossing, attempts to beat the passage of the train, and fails to his hurt, cannot recover for the previous simple negligence of the railroad company. M. & O. R. R. Co. v Martin, 117 Ala. 367, 386.

In Georgia the doctrine of comparative negligence has been established by statute, but, in adjudicating causes of action originating in other states, the Georgia courts will apply the statutory law of these states, in so far as the substance of the right may be affected thereby. If the right to be adjudicated is not controlled by a statute, the Georgia courts will apply to it the principles of the common law as **they have themselves interpreted and expounded that law.** And, with respect to causes of action orignating in Alabama, they expressly declare: "We are not bound by the interpretation of the common law as made by the courts of Alabama; as to what is the common law on this subject this court is not only competent to decide, although the accident occurred in Alabama, but it is its duty to decide, the common law being the same in both jurisdictions." Krogg v. Atlanta, etc., Railroad, 77 Ga. 202, 4 Am. St. Rep. 79; Thomas v. Clarkson, 125 Ga. 72.

In Georgia, as in Alabama, the plaintiff's contributory negligence is, on common law principles, recognized as a defense which bars a recovery. And in either state the general standard of negligence is the same, namely, the doing or omitting to do of that which a man of ordinary prudence would not do, or omit to do, under similar circumstances. But here the parallel ends. The Georgia view of the common law in cases like this can best be stated in the language of Bleckley, C. J., speaking for the court in the leading case of R. & D. R. R. Co. v. Howard, 79 Ga. 44; 3 S. E. 426:

> "The precise thing which every man is bound to do before stepping upon a railroad track, is that which every prudent man would do under similar circumstances. If prudent men would look and listen, so must every one else, or take the consequences so far as the consequences might have been avoided by that means. The court cannot instruct the jury what a prudent man would do, for in legal contemplation the jury know it better than the court. If instructions on that subject had to be given, the jury would be the instructors and the court the instructed, that is, the jury would charge the judge on that part of the case, rather than receive a charge from him. It is not for the court to teach the jury the ways of the prudent man, but to warn them of the duty on the part of all others to make their ways like his. The court cannot point out to the jury specifically the ways of the prudent, the law supposing those ways better known to the jury than to the judge. **It is not incumbent upon the court to instruct the jury that it is the duty of one who attempts or intends to cross a railroad track to use his senses of hearing and seeing before stepping on the track.**"

In the case the following charge was held to have been properly refused by the trial judge: "When one attempts or intends to cross a railroad track, it would be his duty, before stepping on the track, to use his senses of hearing and seeing; and if he fails to do it, and you believe that in such failure he was not in the exercise of ordinary care, and that ordinary care required his to look and listen, and if he had done so he would have avoided the injury, then your verdict should be for the defendant." (Italics ours).

The foregoing statements pointedly exhibit the radical difference between the theories of the law which governs respondent's case in Georgia and in Alabama.

Counsel for respondent recognize the difference, of course, but they insist that the difference is not one of **substantive law,** but only of **procedure;** that it is, in short, a difference merely in the rules of evidence and the sufficiency of proof, as to which this court, in harmony with the authorities generally, has held that the lex fori should always control. Helton v. Ala. Mid. R. R. Co.,

97 Ala. 285, 12 South. 276; 5 R. C. L. 1044, §136. This rule is sound enough, so far as the cause of the trial court is concerned, but it does not go to the root of the present question; for, we apprehend, if the law of Georgia—contrary to the law of Alabama—disqualified from testifying the only witness by whom complainant could establish its defense, respondent's resort to a Georgia court, in order to suppress the testimony of that witness, would be as unfair, and the result as perversive of justice, as would be a complete denial of the doctrine of contributory negligence as a defense.

But, however that may be, we cannot agree that the question involves merely a rule of evidence. So far as the courts of Georgia are concerned, it may be conceded that the plaintiff's conduct, whatever it may be—since it is merely some evidence to be considered by the jury in applying the standard of due care at their own discretion—does involve only a matter of evidence. But, in Alabama, the particular conduct here at issue is not merely evidence tending to prove a conclusion, but it is **per se** a defense to the suit. When the law declares that such contributory conduct conclusively establishes the defense of contributory negligence, it withdraws the issue from the field of evidence, and creates a rule of **substantive law.** This result is clearly stated by Prof. Wigmore in his observations on so-called conclusive presumptions: "Wherever from one fact another is conclusively presumed, in the sense that the opponent is absolutely precluded from showing by any evidence that the second fact does not exist, the rule really provides that, where the first fact is shown to exist, the second fact's existence is wholly immaterial for the purpose of the proponent's case; and to provide this is to make a rule of substantive law, and not a rule apportioning the burden of persuading as to certain propositions, or varying the duty of coming forward with the evidence. The term has no place in the principles of evidence and should be discarded." 1 Greenl. on Ev. (16th ed.), p. 108. An apt example will be found in Hall, etc., Co. v. Haley, etc., Co. 174 Ala. 190, 202, 56 South. 726.

In the case before us, it is clear that, by resorting to the Georgia court for the enforcement of his alleged claim against complainant, respondent seeks an adjudication thereof under a theory of the law which denies to complainant the benefit of a perfect legal defense which would be available to him in Alabama courts—a result which is offensive to justice and equity. Nor is it any answer to say that a jury of Georgia might, if they saw fit, deny a recovery to respondent because of his contributory conduct; for in an Alabama court respondent's alleged conduct would entitle complainant to a verdict **as matter of law,** and the change of forum denies to complainant this affirmative legal right.

Upon these considerations, we think that the bill of complaint exhibits a proper case for the exercise of the injunctive process prayed for; and that, upon the pleadings and evidence before the trial court, the temporary writ of injunction was properly issued.

There is no merit in the contention that complainant's appearance by attorney for defense of the suit in the Georgia court was such a submission to the jurisdiction of that court as waived complainant's right to maintain this bill. The question is in no sense one of jurisdiction, but merely of respondent's equitable right to prosecute that suit to the evasion of the laws of the state in which both parties reside, and in which they found occasion for the exercise of mutual duties in the premises.

Complainant's personal appearance, after a writ of garnishment had been served on one of its debtors, accomplished no more than a personal summons would have done, and, for the purposes here concerned, the mode of service is immaterial.

The case of Tenn. etc., Co. v. George, 233 U. S. 354, 56 L. Ed. 997, upon which appellant strongly relies, merely holds that an Alabama statute cannot, while creating a transitory cause of action, deny to the courts of other states the right to entertain a suit for its enforcement. It does not even refer to the case of Cole v. Cunningham, 133 U. S. 107, and has no sort of bearing on the present case.

Let the decree of the circuit court be affirmed.

Affirmed.

Anderson, C. J., Mayfield, and Thomas, JJ., concur.

Master and Servant—Master's Liability For Injury to Third Person—Scope of Employment.—In an action for injuries resulting from a gun shot inflicted by a watchman in the employ of defendant railroad company, plaintiff's evidence was that on the afternoon of the day of the shooting, he was standing about 220 feet or more from the place where the shooting occurred, near the beginning of a freight yard. The plaintiff heard several shots and ran over to the railroad track and there saw defendant's watchman standing over a man by the name of Ferris, whom plaintiff knew, and when within three or four feet of the watchman, he was fired upon by the watchman and seriously wounded. On this evidence the court held that the act of defendant's watchman was a willful one, not expressly or impliedly within the line of his employment, and that, therefore, the company was not responsible. Ward v. Erie R. Co. (N. J.), 100 Atl. 1029.

Freight—Misrouting.—Grain was delivered to the carrier at Comstock, Minn., for shipment to Minneapolis, Minn., no routing being specified by the shipper. There were two routes by which the grain could have moved, one wholly within the state, the other passing through North Dakota. The rate was lower via the intrastate route, but the interstate route was shorter and the grades were better, permitting heavier loading of trains. The carrier forwarded the shipment by the interstate route and collected the higher rate applicable by that route. In an action by the shipper for overcharge the court held there could be no recovery since it would be unreasonable under the circumstances to expect the carrier to send the shipment by the intrastate route. Comstock Farmers' Elevator Co. v. Great Northern Ry. Co. (Minn.), 163 N. W. 280.

AUTOMOBILES REQUIRED TO STOP AT GRADE CROSSINGS IN TENNESSEE.

The recent Tennessee Legislature passed an act which requires all motor-driven vehicles to come to a full stop between 10 and 50 feet from all railroad crossings. The act applies to all such vehicles, except police, fire and hospital ones responding to emergency calls, and to all grade crossings except those at which flagmen or watchmen are on duty. The law carries a penalty for its violation. The observance of the law, which is reproduced below in full, should go a long way in preventing crossing accidents in Tennessee.

Following is the full text of the act:

Section 1. Be it enacted by the General Assembly of the State of Tennessee, that the driver of every automobile, motorcycle or other motor-driven vehicle be and is hereby required when traveling any public road, street or highway, to come to a full stop before crossing railroad tracks at grade, at a distance of not less than ten feet nor more than fifty feet from the nearest rail of such railroad or tracks. Provided, however, that this Act shall not apply to the automobiles or other motor-driven vehicles of any municipality when responding to an alarm of fire, and shall not apply to the automobiles or other motor-driven vehicles of the police department of any municipality when responding to an emergency call, or motor-driven ambulances responding to an emergency call. Provided, further, that this section shall not apply to railroad crossings at grade while flagmen or watchmen are protecting such crossings.

Section 2. Be it further enacted, That any person violating Section 1 of this Act shall be guilty of a misdemeanor, punishable by a fine of not less than $1.00 or more than $10.00.

Section 3. Be it further enacted, That this Act take effect from and after its passage, the public welfare requiring it.

Carriers of Goods—Loss—Burden of Proof.—The action was by the shipper for loss of 117 pounds of cotton from a bale shipped from Summerton, S. C., to Charleston, S. C. Plaintiff proved the weight of the bale at time of shipment and that the account sales receiver from the consignee showed a loss of 117 pounds. The defendant's evidence was that the bale was delivered to the consignee's drayman in good condition with no evidence of any shortage, and this testimony was supported by that of the drayman. Held that defendant had overcome the presumption that the loss occurred while the cotton was in its possession, and judgment should be in its favor. Ragin v. Northwestern R. R. Co., decided by Sup. Ct. of S. C., about July 10, 1917.

Master and Servant—Injuries To Persons On Tracks.—A person not regularly employed by a railroad company, who went to its yard office to request a pass, is at most a mere licensee and assumes the risk of injury from passing trains. Illinois Cent. R. R. Co. v. Pierce's Admr. (Ky.), 194 S. W. 534.

Liability of Consignee To Prosecution Under Section 10 of the Act to Regulate Commerce Making it Misdemeanor to Falsely Bill, Classify, Etc. Shipments for the Purpose of Defeating the Tariff Rate.—Section 10 of the Act provides:

> "Any person, corporation, or company, or any agent or officer thereof, who shall deliver property for transportation to any common carrier subject to the provisions of this Act, or for whom, as consignor or consignee, any such carrier shall transport property, who shall knowingly and willfully, directly or indirectly, himself or by employee, agent, officer, or otherwise, by false billing, false classification, false weighing, false representation of the contents of the package or the substance of the property, false report of weight, false statement, or by any other device or means, whether with or without the consent or connivance of the carrier, its agent, or officer, obtain or attempt to obtain transportation for such property at less than the regular rates then established and in force on the line of transportation; * * * shall be deemed guilty of fraud, which is hereby declared to be a misdemeanor, and shall, upon conviction thereof in any court of the United States of competent jurisdiction within the district in which such offense was wholly or in part committed, be subject for each offense to a fine," etc.

In a case where the consignee was prosecuted for falsely stating the number of feet of lumber in a shipment after he had received delivery of the lumber from the carrier the court held that the offense of false billing and representations specified in the third paragraph of Section 10 of the Act to Regulate Commerce as amended June 18, 1910, c. 309, 36 Stat. 549, applies to consignees as well as to consignors of interstate shipments; and where, as in this case, false representations are made by the consignee in liquidation of the amount payable for freight at destination, the offense is wholly or in part committed at that place and the District Court of that District has jurisdiction of an indictment charging the offense to have been therein committed by the consignee.

The offense under the Act of June 18, 1910, is not analogous to that of obtaining money under false pretenses, but may be committed where the interstate transportation has already been completed and the amount due therefor remains to be adjusted, and with the same effect as though the false representations had preceded the delivery of the goods to the carrier for interstate shipment. U. S. v. Union Manufacturing Co., 240 U. S. 605.

Master and Servant—Assumption of Risk.—The danger in attempting to cross a track in front of an engine only a few feet away and approaching at a speed of 6 to 9 miles an hour is so obvious and imminent that a section hand, even if ordered by his foreman to do so, assumes the risk, he knowing it was coming, and it being in plain sight. Louisville & N. R. R. Co. v. Williams's Admr. (Ky.), 194 S. W. 920.

ADDITIONAL CONFERENCE RULINGS BY INTERSTATE COMMERCE COMMISSION.

In the April issue of The Memorandum, all Conference Rulings adopted by the Interstate Commerce Commission since Supplement No. 2 to Conference Rulings Bulletin No. 6, dated July 26, 1915, were published. Additional rulings have been adopted to July 15, 1917, as follows:

In conference May 12, 1917, the Commission adopted the following ruling as to filing informal complaints, rescinding its announcement of April 27, 1916:

> Section 16 of the Act to Regulate Commerce provides that "All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues and not after." In Blinn Lumber Co. v. Southern Pacific Co., 18 I. C. C., 430, it was decided that the period of two years within which complaints may be filed is to be computed from the date of the delivery of the shipment.
>
> In all cases the complaint must be filed by or on behalf of the party who has borne the transportation charges as such. See International Agricultural Corporation v. Louisville & Nashville Railroad Co., 29 I. C. C., 391, and Oden & Elliott v. Seaboard Air Line Railway, 37 I. C. C., 345.
>
> With respect to the circumstances under which the informal presentation of a complaint operates to stay the statute of limitations, the Commission holds that the informal complaint must be filed with the Commission within two years from the time the cause of action accrues, (a) must name the defendant carrier or carriers; (b) must allege a violation of the act, and ask affirmative relief; and (c) must describe the shipment by naming the point of origin and destination, the consignor and consignee, the date of the shipment, the initials and number of car, in case of carload shipments, or must give such available information as may be reasonably necessary to identify the shipment. A notification to the Commission "of the possibility or intention of future filing of complaint for the recovery of damages" is not such a filing as is contemplated by the statute.
>
> Complaints embodying such a statement of the shipments, as indicated above, should be filed with sufficient copies in order that a copy thereof may be sent to each defendant carrier as notice to it of the complaint, and one additional copy for the use of the Commission.
>
> When a complaint for reparation has been before the Commission informally on the special docket or otherwise, and the parties have been notified by the Commission that the complaint is denied or that it cannot be determined informally, or when the parties voluntarily withdraw the complaint from informal consideration, it may not be reconsidered informally if it is not again submitted within six months from the date of such notification or withdrawal, nor may it be filed as a formal complaint unless so filed within six months from the date of such notification or withdrawal; Provided, however, that this ruling does not apply when the two-year period from the date of delivery of the shipment has not expired. See rule III of the Rules of Practice.

The Commission in conference adopted the following Ruling:

> **Conference Ruling 474-(b) Amended And Ruling 398 Rescinded.**—In case the consignee elects to accept the shipment at the terminal where delivery has been erroneously offered rather than insist upon delivery at the terminal designated, the shipper or the consignee is entitled to recover damages in the sum of the difference between the expense of drayage actually incurred at a reasonable charge therefor and the expense which would have been incurred if proper delivery had been effected by the carrier. The carrier responsible for misrouting the shipment, resulting in a claim of this character, may reimburse the shipper or consignee entitled to reimbursement wholly at its expense without a specific order of the Commission in each case. In pursuing this course carriers must accept full responsibility for the correct application of the rule and must make reports to the Commission in accordance with its order of July 3, 1917.

The Commission in conference adopted the following Conference Ruling, rescinding Ruling 456:

> It is the view of the Commission that the provision in the uniform bill of lading requiring that claims for loss, damage or delay must be made in writing within a specified period is legally complied with when the shipper, consignee or the lawful holder of the bill of lading, within the period specified, files with the agent of the carrier, either at the point of origin or the point of delivery of the shipment, or with the general claims department of the carrier, a claim or a written notice of intended claim describing the shipment with reasonable definiteness.

Federal Employers' Liability Act—Employment in Interstate Commerce—Section Hand Peeling Ties.—Plaintiff, a section hand, was injured while peeling ties intended for use in defendant's interstate roadbed. The ties had been purchased in another state and shipped to the section on which plaintiff was employed. They were dumped in piles of from 30 to 50 to be peeled and subsequently used where needed in the repair of the track. It was sought to bring plaintiff within the class of employees covered by the federal Employers' Liability Act, but the Supreme Court of Wisconsin held that the peeling was part of the process of manufacture and did not constitute interstate commerce work. Karras v. Chicago & N. W. Ry. Co. (Wis.), 162 N. W. 923.

INTERSTATE COMMERCE COMMISSION DECISIONS.

SHIPPER MUST PAY FOR CAR OF SIZE ORDERED

Complainant advised carrier's agent he would have about 72,000 pounds to ship and was informed defendant did not own or have in its possession any cars of marked capacity between 60,000 and 80,000 pounds, and that it would be necessary to use an 80,000-pound car, and a car of that capacity was ordered. At the trial defendant stated that while it owned no cars of less than 80,000 pounds capacity in which the shipment could have been loaded, other lines have cars of 70,000-pounds capacity and had such a car been ordered by complainant it would have been necessary for defendant under its rules either to furnish a car of that capacity or to assess charges on basis of actual weight if a car of greater capacity was furnished. Complainant did not know of the rule and did not order 70,000-pounds capacity car because defendant owned none of that kind.

HELD: Charges, which were based on minimum of 80,000 pounds, had been lawfully assessed; that the fact that complainant may have been misled by defendant's agent into believing it necessary for him to order larger car than was required affords no ground for reparation. Wilcox Mercantile Co. v. Wabash R. R. Co., 44 I. C. C. R. 552.

VALIDITY OF RESTRICTIONS IMPOSED BY TRACKAGE AGREEMENT

Defendant, in order to connect two separated parts of its line, uses a portion of the rails of another carrier, subject to a condition in the trackage agreement that excludes the defendant from serving industries on private sidetracks connected with the leased line. Operator of coal mine on such a sidetrack demands service at its mine, by the defendant.

HELD: Defendant may, under the restraint of the contract, lawfully decline to serve the coal mine. Hocking Domestic Coal Co. v. Kanawha & M. Ry. Co., 44 I. C. C. R. 392.

COMMISSION HAS NO JURISDICTION TO AWARD DAMAGES FOR LOSS OF CORN IN TRANSIT

Complaint alleged damage of 7½ cents a bushel on corn lost in transit because defendant paid it only 82 cents per bushel for the corn lost, instead of 89½ cents per bushel. Defendant moved to dismiss for want of jurisdiction.

HELD: Commission's jurisdiction does not extend to claims arising from loss or damage to shipments in transit, such claims being cognizable only in the courts. Buss Co. v. New York C. R. R. Co., 45 I. C. C. R. 161.

APPLICATION OF TARIFF PROVISIONS

Defendant assessed a charge of $5 per car against shipment of potatoes, which was alleged to be unreasonable and unlawful. Its tariff provided that freight transported thereunder, in addition to the rates named, would be subject to the rules and regulations of the individual lines parties thereto. A transcontinental freight tariff contemporaneously in effect, and concurred in by defendant, named a charge of $5 per car per trip for the use of refrigerator or insulated car furnished upon shipper's order, and this provision was relied upon by defendant as authority for making the charges assailed.

HELD: The provision of defendant's tariff referred only to the rules and regulations of individual lines relating to car service, switching, etc., and the terms used may not properly be interpreted as authorizing the application to these shipments of the provision referred to in the transcontinental freight tariff, and therefore the charges assailed were collected without tariff authority. Vallance v. Northern Pacific Ry. Co., 45 I. C. C. R. 131.

CONSTRUCTION OF TARIFFS—INTENTION OF FRAMERS

In assessing charges on an iron tank, weighing 2,750 pounds, which was too large to load through the side door of an ordinary open car 40 feet, 6 inches long, minimum of 5,000 pounds was used, and complainant contended that the minimum legally applicable was 4,000 pounds. Tariff governing contained provision that "shipments * * * loaded on open cars are subject to a minimum charge equal to that for 5,000 pounds," etc., an exception being "shipments requiring open cars, account of inability to load through side doors of an ordinary box car not less than 40 feet, 6 inches in length, are subject to a minimum charge equal to that of 4,000 pounds," etc. Defendant's representative stated that, while the rule quoted and the exception thereto were indefinite, it was the intention to provide a minimum weight of 5,000 pounds on shipments so large as to require open cars, and 4,000 pounds on long or bulky articles which could not be loaded through the side doors of an ordinary box car not less than 40 feet, 6 inches in length, but could be loaded in furniture, automobile or other closed cars.

HELD: The tariff contained no such restriction, and tariffs must be construed according to their language, and the intention of the framers is not controlling. Prairie Oil & Gas Co. v. Wabash Ry. Co., et al., 45 I. C. C. R. 1.

COMMISSION DECLINES TO ALLOW THE CARRIERS GENERAL 15% ADVANCE IN RATES.

The carriers throughout the country filed in May, 1917, effective July 1, 1917, tariffs containing rates 15% higher than those in effect when the tariffs were filed. Hearings on the proposed advance continued for about a month, and the argument three days, after which the Commission issued a report, dated June 27, 1917 (announced June 29), declining to allow the advance on anything except bituminous coal, coke, and iron ore, as to the first two of which commodities the carriers had limited the advance to 15 cents a ton where an advance of 15% would result in excess of that amount. The majority opinion of the Com-

mission held that the carriers had not shown that such a general advance as that proposed was necessary to offset the extraordinary additions to their operating expenses caused by large increases in the wages of employees and in the prices of fuel and other material and supplies, coupled with the prospect of further increases. Toward the conclusion of its report the Commission said:

> "The carriers were clearly within their rights in bringing these matters to our attention when they did. We do not question their good faith in anything they have done in this connection. Their action is an added evidence of the farsightedness and sense of responsibility in the performance of their duties toward the public with which so many of their officials are managing and administering the affairs of their respective properties. The things which they believed several months ago would happen have not happened."

The Commission also found, however, that the conditions confronting the eastern carriers are "substantially different from those confronting the southern and western carriers," and that they are entitled to increased revenue beyond that which they are securing and will secure from the increased rates on coal, coke, and iron ore, and prescribed a maximum scale of class rates between New York and Chicago of 90, 79, 60, 42, 36 and 30, on 1st, 2nd, 3d, 4th, 5th and 6th classes respectively; and to correspondingly increase their other class rates between points in Official Classification territory. It was also decided that rail-and-water rates throughout the country might be increased to a level with the all-rail rates. The Fifteen Per Cent Case, Ex Parte No. 57, 45 I. C. C. R. 303.

Master and Servant—Assumption of Risk.—An experienced section hand engaged in placing ties under rails assumed the risk of an injury to his eye due to a small portion of ice or cinders which covered the ties, which was caused to fly when his companion struck the rail with a pick. Jones v. Southern Ry. Co. (Ky.), 194 S. W. 558.

Carriers of Livestock—Notice of Claim—Waiver.—Provisions in a contract for carriage of an interstate shipment of livestock that as a condition precedent to recovering damages for loss or injury to the stock the shipper will give the carrier notice in writing of his claim within 24 hours after delivery at destination, and that suit shall only be brought within six months after the cause of action accrued, are valid and cannot be waived by the carrier. Chicago, R. I. & P. Ry. Co. v. Gray (Okla.), 165 Pac. 157.

Railroads—Injuries To Children on Train By Permission of Trainmen.—Where railroad employees, without the consent of the company, permitted a boy to ride on an engine that was being tested, the company owed him no duty to protect him from injury by derailment of the engine or otherwise, unless due to wanton, willful, or intentional acts of the railroad employees. Duree v. Wabash R. Co., 241 Fed. 455.

Master and Servant—Sufficiency of Evidence As To Cause of Servant's Death.—Deceased was a night watchman upon a wharf. The evidence showed that it was his duty to "ring in, at regular intervals, certain boxes, twelve in number, situated at various points on the wharf. * * * At 6:30 P. M., on November 5, 1914, the deceased began to make his rounds of the boxes for the first time that day; that he rang in seven boxes as usual, but never rang in another box." A search was instituted in a few minutes but no trace of him was found except his hat floating on the water and his keys on a lighter moored to the wharf. His body was found next morning. In the path of one going to the eighth box was a loose plank in the flooring, and plaintiff sought to attribute deceased's fall into the water to this defect, but the court held that it was a matter of conjecture how deceased happened to get into the water and the defendant could not be held liable. Lyford v. Boston & M. R. R. (Mass.), 116 N. E. 416.

Carriers—Intoxicating Liquor—Criminal Law.—The South Carolina statute prohibiting the importation, etc., of intoxicating liquors in excess of one gallon per month, provides in section 3 that "it shall be unlawful for any person, firm, corporation, or company to ship, transport," etc., liquor except as permitted in the Act. Section 7 provides that "any person violating any of the provisions of the Act" shall be subject to fine or imprisonment or both.

HELD, that a corporation could not be punished under the Act. The court says: "Criminal statutes must be strictly construed. The Act itself uses the words, persons, firms, corporation or company. So the legislature had the difference between persons, firms, corporations and companies in mind, and mindful of the difference, has seen fit to punish the person and not the firms, corporations or companies. For this reason the indictment should have been quashed." State v. Southern Exp. Co., decided by Sup. Ct. of S. C., about July 10.

Master and Servant—Assumption of Risk.—Where machinery is in a servant's entire charge, he stands in the relation of vice-principal, and assumes the risk due to his failure to properly repair or operate it. Cincinnati, N. O. & T. P. Ry. Co. v. York (Ky.), 194 S. W. 1034.

Master and Servant—Simple Tool Doctrine.—Plaintiff was one of the helpers in a well-drilling crew, composed of a driller and four helpers, who, at the time of the accident, were engaged in what they called knocking down pipe, which operation consisted in unscrewing and separating into its original lengths the pipe that was taken out of a well. It was necessary, in order to unscrew the pipe, to strike the joints with a sledge hammer to loosen the threads. Plaintiff was thus engaged, striking with a 14-pound hammer, when his foot slipped and he fell into the machinery. One allegation of negligence was that the hammer furnished him was too heavy, the proper weight hammer being one weighing 4 or 5 pounds. HELD, that the danger incident to the use of a heavy hammer was an obvious danger, of which the servant assumed the risk. Wiggins v. Standard Oil Co. of Louisiana (La.), 75 So. 232.

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